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# Survey of Developments in West Virginia Law: 1980

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## SURVEY OF DEVELOPMENTS IN WEST VIRGINIA LAW: 1980

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### ADMINISTRATIVE LAW

*Anderson & Anderson Contractors v. Latimer*<sup>1</sup> involves an appeal from a circuit court judgment permitting complete retroactive application of the 1971 amendments to the Surface Mining and Reclamation Act<sup>2</sup> and holding that a pre-hearing cessation of surface mining operations upon an inspector's order was constitutional. The supreme court held that the 1971 amendments could not be applied in a completely retroactive manner by the Department of Natural Resources, and further held West Virginia Code § 20-6-14a<sup>3</sup> to be constitutional, thus allowing pre-hearing cessation of surface mining operations.<sup>4</sup>

Justice Neely initially considered "whether the 1971 amendments to the Surface Mining and Reclamation Act of 1967 apply in their entirety to surface mining operations begun under permits issued before the effective date of the 1971 amendments."<sup>5</sup>

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<sup>1</sup> 257 S.E.2d 878 (W. Va. 1979).

<sup>2</sup> W. VA. CODE § 20-6-1 to -32 (Cum. Supp. 1980).

<sup>3</sup> (1978 Replacement Vol.).

<sup>4</sup> 257 S.E.2d at 882-83.

<sup>5</sup> *Id.* at 880.

The Surface Mining and Reclamation Act of 1967 was West Virginia's first comprehensive attempt at regulating the surface mining industry.<sup>6</sup> A provision of this act required mine operators to comply with any subsequent amendments or regulations which may be promulgated.<sup>7</sup> The Act did not, however, require compliance with new amendments or regulations if reclamation work had been satisfactorily performed prior to the effective date of the amendment or regulation.

The appellants, proprietors of various strip mining operations, argued that they were not subject to the 1971 amendments to the Surface Mining and Reclamation Act on land where reclamation work had been satisfactorily performed prior to the effective date of these amendments.<sup>8</sup> The appellees, individual members of the reclamation commission, argued that under West Virginia Surface Mining and Reclamation Regulations § 301 the appellants would be subject to the 1971 amendments, since the reclamation work had not been "approved" prior to the effective date of the amendments.<sup>9</sup>

The court saw this regulation as adding an additional requirement to West Virginia Code § 20-6-31,<sup>10</sup> which provided that work merely be satisfactorily performed.<sup>11</sup> This additional requirement rendered the 1971 amendments completely retroactive, rather than partially retroactive as provided by the statute. Complete retroactivity resulted from the fact that *all* reclamation work must have been completed for an entire surface mining op-

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<sup>6</sup> *Id.*

<sup>7</sup> W. VA. CODE § 20-6-31 (1978 Replacement Vol.).

<sup>8</sup> 257 S.E.2d at 879-80.

<sup>9</sup> *Id.* at 880; West Virginia Surface Mining and Reclamation Regulations § 301 (1972) states:

Conversion - Any operator holding a valid surface mining permit issued prior to the effective date of these regulations, shall within 60 days after the effective date thereof, convert such permit and bond or other securities posted therefor to comply with all the provisions of Article 6, Chapter 20, Code of West Virginia, as amended, and all rules and regulations promulgated thereunder, if mining operations are to continue after said date. The provisions of this regulation shall not be construed to require the regrading or replanting of any area where such work was satisfactorily performed and *approved* prior to the effective date of these regulations. (emphasis added).

<sup>10</sup> (1978 Replacement Vol.).

<sup>11</sup> 257 S.E.2d at 880.

eration before any could be "approved" by the Department of Natural Resources. Therefore, it would be impossible for any surface mine still operating in 1971 to have any "approved" work.<sup>12</sup>

The supreme court ruled the appellants were permitted to avail themselves of pre-1971 standards for reclamation work which had been "satisfactorily performed" prior to the effective date of the 1971 amendments,<sup>13</sup> thus eliminating the added requirement created by the regulation. Justice Neely stated that reclamation legislation should be interpreted exactly as written.<sup>14</sup>

In a second aspect of the decision, the court decided the constitutionality of West Virginia Code § 20-6-14a,<sup>15</sup> which provides for a prehearing cessation of surface mining operations upon the order of a surface mining reclamation inspector.<sup>16</sup> The appellants argued that the statute was unconstitutional because surface mining inspectors are given authority to "make and apply law," and no timely hearing to review shutdown orders is provided.<sup>17</sup>

Justice Neely disputed the claim of inspectors having the

<sup>12</sup> *Id.* at 880-81.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> (1978 Replacement Vol.).

<sup>16</sup> W. VA. CODE § 20-6-14a (1978 Replacement Vol.) provides:

Notwithstanding any other provisions of this article, a surface-mining reclamation inspector shall have the authority to order the immediate cessation of any operation where (1) any of the requirements of this article or the rules and regulations promulgated pursuant thereto or the orders of the director or the commission have not been complied with or (2) the public welfare or safety calls for the immediate cessation of the operation. Such cessation of operation shall continue until corrective steps have been started by the operator to the satisfaction of the surface-mining reclamation inspector. Any operator who believes he is aggrieved by the actions of the surface-mining reclamation inspector may immediately appeal to the director, setting forth reasons why the operation should not be halted. The director shall determine when and if the operation may continue.

Note that the proposed West Virginia Coal Mining and Reclamation Act revises this section. W. VA. CODE § 20-6-1 (Cum. Supp. 1980). However, this act will not be effective until the governor issues a proclamation based upon a finding that the Secretary of the U.S. Department of the Interior has approved the West Virginia state program under § 503 of the Federal Surface Mine Control and Reclamation Act of 1977. 30 U.S.C. § 1253 (Supp. I, 1977).

<sup>17</sup> 257 S.E.2d at 882.

power to "make and apply law." He believed inspectors were given sufficient guidance, by West Virginia Code § 20-6-1<sup>18</sup> and regulations promulgated by the Department of Natural Resources, as to when a pre-hearing cessation order is required. All cessation orders are required to have a basis in specific statutes and regulations<sup>19</sup> or in protection of the public safety or welfare from a clear danger.<sup>20</sup>

The court then considered the appellant's assertion that West Virginia Code § 20-6-14a violated procedural due process guarantees. The court employed a two-fold analysis: (1) Is a pre-cessation hearing required, and (2) if a pre-shutdown hearing is not required does the Surface Mining and Reclamation Act provide an adequate post-cessation hearing?<sup>21</sup> Justice Neely applied the balancing tests of *Mathews v. Eldridge*<sup>22</sup> and *North v. West Virginia Board of Regents*<sup>23</sup> and concluded that cessation orders temporarily halting surface mining operations are constitutional. This conclusion was based upon the balancing of the need for pre-cessation hearings against the possible harm to the public welfare which could result if complex pre-cessation hearing procedures were abused by coal company lawyers.<sup>24</sup>

Although a pre-cessation hearing is not required, a mine op-

<sup>18</sup> (Cum. Supp. 1980).

<sup>19</sup> See, e.g., Department of Natural Resources Regulations, Series VII, 1978, §§ 2, 9 (noxious materials); §§ 6, 9 (landslides); and §§ 2, 7, 8, 9 (stream pollution).

<sup>20</sup> 257 S.E.2d at 882. See W. VA. CODE § 20-6-1 (Cum. Supp. 1980).

<sup>21</sup> *Id.* at 882-83.

<sup>22</sup> 424 U.S. 319 (1975). The balancing test of *Mathews v. Eldridge* compares:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. 424 U.S. at 335.

<sup>23</sup> 233 S.E.2d 411 (W. Va. 1977). This balancing test provides:

First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation. 233 S.E.2d at 417.

<sup>24</sup> 257 S.E.2d at 883.

erator has a right to an immediate appeal subsequent to the issuance of a cessation order. This hearing must not only be adequate procedurally, it must also be prompt. Justice Neely warned that if the Department of Natural Resources unnecessarily delays a post-cessation hearing, the agency may lose its jurisdiction to require cessation.<sup>25</sup>

In a concurring opinion Justice Miller argued that the majority proposition of an agency losing jurisdiction over a proceeding because of unnecessary delay was contrary to West Virginia case law and to the general thinking in administrative law.<sup>26</sup> He theorized that judicial termination of agency jurisdiction should "only be considered in the most extreme cases."<sup>27</sup>

This case serves notice on state administrative agencies that they must act promptly in providing post-cessation hearings or risk losing jurisdiction over the matter if they delay for an unreasonable period of time. What constitutes an unreasonable delay will depend upon the particular facts and circumstances of the individual case. Factors to be considered in deciding whether to terminate an agency's jurisdiction due to delay include the harm which the private party has suffered because of the delay, and the effect that a termination of jurisdiction would have on the proper function of the administrative process.<sup>28</sup>

The West Virginia Supreme Court of Appeals in *Thorne v. Roush*<sup>29</sup> held that the "junior barbering" apprenticeship mandated by West Virginia Code § 30-27-3<sup>30</sup> restrained trade and cur-

<sup>25</sup> *Id.* at 883-84.

<sup>26</sup> *Id.* at 884.

<sup>27</sup> *Id.* at 885.

<sup>28</sup> Goldman, *Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423, 1453 (1968).

<sup>29</sup> 261 S.E.2d 72 (W. Va. 1979).

<sup>30</sup> (Cum. Supp. 1980). This statute reads in part:

An applicant for licensure as a barber . . . shall present satisfactory evidence that he or she . . . has been graduated from a school of barbering . . . approved by the state board of barbers and beauticians . . . and shall transmit with his application an examination fee of twenty dollars. The examination shall be of such character as to determine the qualifications and fitness of the applicant to practice barbering . . . , and shall cover such subjects germane to the inquiry as the board may deem proper. If an applicant for licensure as a barber or beautician successfully passes such examination and is otherwise duly qualified, as re-

tailed individual liberty in contravention of the due process and equal protection guarantees of the West Virginia Constitution. The court also found the junior barber apprenticeship quota system to be unconstitutional.

This case arose on a petition for a writ of mandamus to compel the issuance of a barber's license to the petitioner and all others similarly situated. The petitioner, a recent barber college graduate licensed as a duly qualified "junior barber," had been unable to gain employment in that capacity. Without serving a twelve-month apprenticeship the petitioner could not be licensed as a barber under West Virginia Code § 30-27-3. The petitioner argued that the apprenticeship requirement was unconstitutional since it denied her equal protection of the law and constituted an abuse of the state's interest in policing the barbering trade.<sup>31</sup>

Justice McGraw began his opinion by noting that the state's interest in regulating the barbering profession is valid.<sup>32</sup> The basis for such regulation is the protection of the health and welfare of West Virginia's citizens.<sup>33</sup> To withstand constitutional attack, regulations must bear a reasonable relationship to a valid legislative purpose and cannot be arbitrary or discriminatory.<sup>34</sup>

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quired by this section, the board shall license the applicant as a duly qualified junior barber. . . . Upon proof that the holder of such a license has served as a junior barber . . . for a period of not less than twelve months from the original date of such license, accompanied by a certificate of health from a duly licensed physician, the board shall issue to the applicant a license authorizing the applicant to practice barbering . . . in this state.

<sup>31</sup> 261 S.E.2d at 73-74.

<sup>32</sup> *Id.* at 74; *Quesenberry v. Estep*, 142 W. Va. 426, 95 S.E.2d 832 (1956); *Ransone v. Craft*, 161 Va. 332, 170 S.E. 610 (1933). *See also* *Mountaineer Disposal Serv. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973).

<sup>33</sup> *Doyle v. Bd. of Examiners*, 219 Cal. App. 2d 504, 33 Cal. Rptr. 349 (1963). Syllabus point number 5: "Police power is simply the power to subject individuals to reasonable regulation so as to achieve such governmental objectives as the public safety, health, morals and welfare." Syllabus point number 2: "Protection of public health is the police power objective that justifies a statutory licensing system for barbers and provision of minimum standards of education and training is an ancillary objective."

<sup>34</sup> 261 S.E.2d at 74; *State ex rel. Harris v. Calendine*, 233 S.E.2d 318 (W. Va. 1977); *State ex rel. Cobun v. Town of Star City*, 197 S.E.2d 102 (W. Va. 1973); *see* *Bowman v. Virginia State Entomologists*, 128 Va. 351, 105 S.E. 141, 12 A.L.R. 1121 (1920).

Theoretically, the court believed an apprenticeship system is a reasonable requirement for a newly graduated barber.<sup>35</sup> In practice, however, West Virginia's statutory apprenticeship requirements were irrational. Justice McGraw cited the lack of any standard against which competence could be measured as the "most critical defect."<sup>36</sup> The statute did not establish any guidelines to judge an apprentice's competence or require any examination at the end of the apprenticeship period.<sup>37</sup> Under the statute a junior barber's ability to acquire employment as an apprentice was the key to gaining a license, rather than the acquisition of competence. The apprenticeship requirement only provided a labor pool capable of being exploited by licensed barbers, and failed "to contribute in any demonstratable way to the welfare of the public."<sup>38</sup> Therefore, the apprenticeship requirement was seen as restraining trade, curtailing individual liberty, and contravening public policy in a manner violative of the due process and equal protection guarantees of the West Virginia Constitution.<sup>39</sup>

The opinion made it quite clear that the court was not against the concept of training by apprenticeship. Rather, the court provided that an apprenticeship should be "truly of educational value" containing a standard of performance to be met or an examination to be passed.<sup>40</sup>

This case could have an effect on the licensing of individuals in many occupations in West Virginia. Several licensing statutes have apprenticeship requirements quite similar to those for barbers. Occupations with questionable apprenticeship programs include funeral directors<sup>41</sup> and land surveyors.<sup>42</sup>

The West Virginia statutory requirements governing the

<sup>35</sup> 261 S.E.2d at 74.

<sup>36</sup> *Id.* at 75.

<sup>37</sup> *Id.*; W. VA. CODE § 30-27-3 (Cum. Supp. 1980).

<sup>38</sup> 261 S.E.2d at 75.

<sup>39</sup> W. VA. CONST. art. III, § 10. This section provides as follows: "No person shall be deprived of life, liberty, or property, without due process of law . . ."

<sup>40</sup> 261 S.E.2d at 75.

<sup>41</sup> Funeral directors must serve an apprenticeship of one year. W. VA. CODE § 30-6-5 (1980 Replacement Vol.).

<sup>42</sup> A person who is a graduate of an accredited surveying curriculum must also have at least two years of experience in the practice of land surveying to become a licensed surveyor. W. VA. CODE § 30-13A-5 (1980 Replacement Vol.).



number of apprentices who could lawfully be employed in any one barbershop<sup>42,1</sup> were held in *Thorne* to be inconsistent with the West Virginia Constitution's requirements for due process.<sup>43</sup> Justice McGraw stated that the quota system was devoid of any reasonable basis and constituted a restriction on trade and individual liberty.<sup>44</sup> The quota system required the supervision of three licensed barbers for every apprentice in large shops and limited any barbershop, regardless of size, from employing more than three apprentices. In contrast the same statute allowed beauty shops to employ one apprentice for each licensed beautician with no limit on the total number of apprentices which could be employed.<sup>45</sup>

The importance of *Thorne v. Roush* lies in the guidelines set out by the court for licensing statutes with apprenticeship programs in West Virginia. To be valid an apprenticeship statute should place an emphasis on the acquisition of actual knowledge and provide a measure for testing competence acquired.<sup>46</sup>

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<sup>42,1</sup> W. VA. CODE § 30-27-7 (Cum. Supp. 1980).

<sup>43</sup> 261 S.E.2d at 76; W. VA. CONST. art. III, § 10.

<sup>44</sup> 261 S.E.2d at 76.

<sup>45</sup> W. VA. CODE § 30-27-7 (Cum. Supp. 1980).

<sup>46</sup> 261 S.E.2d at 75.

## BUSINESS ORGANIZATIONS

In *Masinter v. WEBCO Co.*,<sup>1</sup> the West Virginia Supreme Court of Appeals recognized the right of minority shareholders to relief upon a showing of oppressive conduct by those in control of the corporation. The court held that the two forms of relief requested, statutory dissolution and damages, did not always embrace the same factual determinations and that each form of relief required a different analysis. The opinion also set forth the definition of oppressive conduct and the standards which give rise to a cause of action for a minority shareholder. Finally, in dicta, the court discussed a particular type of conduct known as "freeze or squeeze out"<sup>2</sup> which might constitute oppressive conduct.

In this case a minority shareholder in a close corporation brought an action as the result of oppressive conduct by the other two shareholders. The cause of action was brought under the court's equitable powers<sup>3</sup> seeking two types of relief: (1)

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<sup>1</sup> 262 S.E.2d 433 (W. Va. 1980).

<sup>2</sup> See F. O'NEAL, "SQUEEZE-OUTS" OF MINORITY SHAREHOLDERS, Chapters 3-8 (1975). This book outlines various techniques to rid oneself of undesirable business associates while also explaining methods to oppose squeeze out techniques.

<sup>3</sup> In 1974 the West Virginia Legislature passed the West Virginia Corporation Act [hereinafter referred to as the Corp. Act] to become effective in 1975. This particular case is decided on the applicable corporation sections existing prior to the Corp. Act. Prior to the Corp. Act there were no statutes concerning remedies and causes of action for oppressive conduct. Although this action was probably brought under the statutory jurisdiction for dissolution granted under W. VA. CODE § 31-1-81 (1931), now W. VA. CODE § 31-1-134 (1975 Replacement Vol.), the court indicates several common law decisions upon which it grants equity jurisdiction for lesser forms of relief other than dissolution. The new Corp. Act includes a statute which explicitly states that oppressive conduct by those in control of a corporation may give rise to a cause of action. W. VA. CODE § 31-1-41 (1975 Replacement Vol.) states:

(a) Any of the circuit courts or inferior courts of record with general civil jurisdiction shall have full power to liquidate the assets and business or affairs of a corporation in an action by a shareholder or member when it is established:

...

(2) that the acts of the directors or those in control of the

dissolution of the corporation and (2) damages as a result of the alleged oppression. The circuit court granted the majority shareholders' motion for summary judgment. The West Virginia court reversed, finding that a genuine dispute existed and that the lower court mistakenly applied the standards for dissolution to the claim of damages for oppressive conduct.

The court viewed dissolution as a severe remedy merited only in the most extreme cases.<sup>4</sup> Courts have recognized that in some cases a minority shareholder has a right to bring suit to obtain appropriate relief other than dissolution.<sup>5</sup> Since there are varying degrees of injury to minority shareholders, each of which might merit a different form of relief, the court concluded that the factual determination required to order dissolution is not necessarily the same factual determination required to award damages.

Although the oppression of minority shareholders can constitute cause for dissolution, a less stringent test is applicable for granting lesser relief. Neither the court nor the statute for dissolution explicitly sets forth the determination that would be sufficient cause for dissolution.<sup>6</sup> The court does note several factors to be considered: whether injury is being conducted systematically or continuously, whether future injuries may be prevented, and whether alternative forms of relief are available.<sup>7</sup>

corporation are illegal, *oppressive* or fraudulent; (emphasis added).

While this statute does not apply to this particular case, the court defined the term "oppressive conduct" and the applicable standards with this statute in mind. There is another advantage to a minority shareholder in bringing the action under W. VA. CODE § 31-1-41 (1975 Replacement Vol.) for oppressive conduct rather than W. VA. CODE § 31-1-134 (1975 Replacement Vol.) for dissolution. There is no requirement that the shareholder own one-fifth of the outstanding shares for an action under oppressive conduct.

<sup>4</sup> 262 S.E.2d at 439.

<sup>5</sup> *Id.* The court discusses several cases where relief to minority shareholders had been granted in case decisions. But none of these was the result of oppressive conduct by majority shareholders. Most of the decisions resulted from a breach of fiduciary duty by the directors or majority shareholders.

<sup>6</sup> See *Williams v. Croft Notion Co.*, 82 W. Va. 549, 96 S.E. 929 (1918) (example of what constitutes sufficient cause for dissolution).

<sup>7</sup> 262 S.E.2d at 439, citing *Hornstein, A Remedy for Corporate Abuse - Judicial Power to Wind Up a Corporation at the Suit of a Minority Stockholder*, 40 COLUM. L. REV. 220, 236 (1940).

To determine whether the alleged conduct merited relief, the court first defined the term "oppressive conduct." The court had previously taken the logical step of extending the fiduciary duty owed to the minority shareholders by directors and officers to majority shareholders.<sup>8</sup> Next the court examined the nature of the fiduciary duty as outlined in previous West Virginia decisions<sup>9</sup> and the definition of oppressive conduct formed by other jurisdictions.<sup>10</sup> The court concluded that the fiduciary duty of those in control of a corporation to minority shareholders was analogous to the good faith and fair dealing standard required of other fiduciaries.<sup>11</sup>

The West Virginia court held that an attempt to "freeze or squeeze out" a minority shareholder may constitute oppressive conduct,<sup>12</sup> but concluded that the record in this case was inadequate to make such a determination. The court did point out two broad factual patterns from which oppressive conduct might be found. The first occurs where the minority shareholder has made substantially the same capital investment as the other shareholders with the expectation of remunerative employment with the corporation. The second is where the minority shareholder was either originally involved in the formation of the corporation or was induced to invest in it with the expectation of

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<sup>8</sup> *Id.* at 438. See *Meadows v. Bradshaw-Diehl Co.*, 139 W. Va. 569, 81 S.E.2d 63 (1954).

<sup>9</sup> *Id.* at 438-40. The court sets out the equivalent standard from West Virginia decisions. See 262 S.E.2d at 440 n.9 citing *Young v. Columbia Oil Co.*, 110 W. Va. 364, 370, 158 S.E. 678, 681 (1931) where the court stated: "They must manage its business with a view to promote the common interest, and cannot directly or indirectly derive personal profit or advantage from their position which is not shared by all the stockholders."

<sup>10</sup> Annot., 56 A.L.R.3d 358 (1974). See also Annot., 83 A.L.R.3d 458 § 11 (1978).

<sup>11</sup> 262 S.E.2d at 440. The fiduciary duty owed by majority stockholders, directors, or officers is a much broader standard than that considered under oppressive conduct. The duty of good faith and fair dealing is only one aspect of the fiduciary duty owed.

<sup>12</sup> A freeze-out is not necessarily improper. A freeze-out may be proper where the minority shareholders are uncooperative and unreasonable to the extent that the majority interests are justified in removing them. See O'NEAL, *supra* note 2 § 101. Note that the oppressive conduct the court seems to be most concerned with is the financial squeeze.

some return on the investment.<sup>13</sup> In both situations the minority shareholders receive some return for a period of time only to find that any return, either by dividend or salary, has been severed through no fault of their own, and not as a result of any legitimate business purpose.<sup>14</sup>

To sustain a cause of action for oppressive conduct the minority shareholder must demonstrate the connection between the alleged action taken by the majority shareholder and a claim under the freeze out theory.<sup>15</sup> Although the court did not attempt to set out remedies for oppressive conduct, it did provide some guidance for possible forms of relief by citing one of the leading cases in the area, *Baker v. Commercial Body Builders, Inc.*,<sup>16</sup> which sets forth ten forms of relief as alternatives to outright dissolution.

*Joel Patrick Jones*

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<sup>13</sup> 262 S.E.2d at 441.

<sup>14</sup> The inclusion of legitimate business purpose presents a difficult burden to overcome and the court has indicated it will permit a rather broad latitude in the conduct of corporate affairs absent fraud or bad faith. *Id.* at 438.

<sup>15</sup> *Id.* at 447.

<sup>16</sup> 264 Or. 614, 632-33, 507 P.2d 387, 395-96 (1973).

## CONSTITUTIONAL LAW

### I. IMPLIED CAUSE OF ACTION

West Virginia took a big step toward doctrinal clarity on the issue of implied causes of action in *Hurley v. Allied Chemical Corp.*<sup>1</sup> The implied cause of action doctrine allows courts to create civil remedies for violations of statutes without express legislative permission.<sup>2</sup>

Before *Hurley*, the West Virginia Supreme Court of Appeals relied on various mechanisms to determine whether a statute implied a cause of action. In negligence cases, the court has held that violation of a statute is *prima facie* evidence of negligence.<sup>3</sup> The court has also said that in order to state a cause of action, a plaintiff must be within the class of persons that the statute intended to protect.<sup>4</sup> In other instances, the court has relied on article III, section 17 of the West Virginia Constitution which provides that the courts shall be open to remedy injuries inflicted upon a person, his property, or reputation.<sup>5</sup>

The *Hurley* case arose when the defendant allegedly refused to employ the plaintiff solely on the basis of the plaintiff's history of treatment at a mental health facility.<sup>6</sup> The case came to the West Virginia court on certified questions. The court was asked to decide whether the denial of employment in the private sector solely on the basis of the applicant having received mental health services violates West Virginia Code § 27-5-9(a)<sup>7</sup> and gives rise to

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<sup>1</sup> 262 S.E.2d 757 (W. Va. 1980).

<sup>2</sup> See Note, *Implied Causes of Action in the State Courts*, 30 STAN. L. REV. 1243 (1978).

<sup>3</sup> See, e.g., *Costello v. City of Wheeling*, 145 W. Va. 455, 117 S.E.2d 513 (1960).

<sup>4</sup> *Steiner v. Muldrew*, 114 W. Va. 801, 173 S.E. 891 (1934).

<sup>5</sup> *State Human Rights Comm'n v. Pearlman Realty Agency*, 239 S.E.2d 145 (W. Va. 1977).

<sup>6</sup> 262 S.E. 2d at 759.

<sup>7</sup> W. VA. CODE § 27-5-9(a) (1980 Replacement Vol.) provides the following:

(a) No person shall be deprived of any civil right solely by reason of his receipt of services for mental illness, mental retardation or addiction, nor shall the receipt of such services modify or vary any civil right of

an implied private cause of action; and whether such denial violates state public policy and gives rise to a cause of action under *Harless v. First National Bank*.<sup>8</sup>

The court quickly dispensed with the plaintiff's second contention by distinguishing the *Hurley* situation from that of *Harless*. The latter case dealt with an employer's retaliatory discharge of an employee who exercised a substantive public right. The court found that a crucial element of a cause of action under *Harless* is that the plaintiff must actually be an employee of the defendant.<sup>9</sup>

Focusing on the plaintiff's first contention, the court reviewed the United States Supreme Court's decision in *Cort v. Ash*<sup>10</sup> and adopted the *Ash* four-pronged analysis to determine whether a given statute implies a cause of action.<sup>11</sup> The West Virginia court set forth the following new test: (1) the plaintiff must be a member of the class for whose benefit the statute was enacted; (2) consideration must be given to whether the legislature intended a private cause of action; (3) an analysis must be made to determine whether a private cause of action is consistent with the underlying purposes of the legislative scheme; and (4) such private cause of action must not intrude into an area traditionally the domain of the federal government.<sup>12</sup> Applying this multi-tiered analysis to the facts, the court concluded that West Virginia Code § 27-5-9(a) creates an implied private cause of action against a private employer who denies employment to an applicant solely on the basis that such individual received services for

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such person, including, but not limited to, civil service status and appointment, the right to register for and to vote at elections, the right to acquire and to dispose of property, the right to execute instruments or rights relating to the granting, forfeiture or denial of a license, permit, privilege or benefit pursuant to any law, but a person who has been adjudged incompetent pursuant to article eleven [§ 27-11-1 et seq.] of this chapter and who has not been restored to legal competency may be deprived of such rights. Involuntary commitment pursuant to this article shall not of itself relieve the patient of legal capacity.

<sup>8</sup> 246 S.E.2d 270 (W. Va. 1978).

<sup>9</sup> 262 S.E.2d at 759.

<sup>10</sup> 422 U.S. 66 (1975).

<sup>11</sup> *Id.* at 78.

<sup>12</sup> 262 S.E.2d at 763.

mental illness, mental retardation, or addiction.<sup>13</sup> The case was remanded to the circuit court for further adjudication.

In its analysis, the West Virginia court found that the plaintiff had received services from a mental health facility and therefore was a member of the class for whose benefit the statute was enacted.<sup>14</sup> As to the second prong, the court looked to the circumstances of the statute's enactment in order to determine legislative intent. Because the legislature did not furnish an administrative remedy and did not indicate that private relief was unobtainable, the court held that the legislature must have intended to imply a private cause of action.<sup>15</sup> In regard to the third tier, the court found an enforcement vacuum to exist in West Virginia Code § 27-5-9(a) and that a private cause of action provides the means of complementing and enforcing the legislative scheme.<sup>16</sup> In reference to the fourth prong of the analysis, the court found that federal legislation in the area of the handicapped applies generally only to the federal government and those institutions which receive federal funds. A private cause of action under West Virginia Code § 27-5-9(a) would help fill a needed gap in state remedies rather than intrude on the federal government's domain.<sup>17</sup>

## II. PRESS' ACCESS TO PRE-TRIAL HEARINGS

An issue of first impression arose in *State ex rel. The Herald-Mail Co. v. Hon. John M. Hamilton*.<sup>18</sup> In this original writ of prohibition, the relator, Herald-Mail Co., sought to prohibit the enforcement of a closure order. The Circuit Court of Hardy County had granted a criminal defendant's closure motion in which the defendant indicated that he was willing to waive his right to a public pre-trial hearing in order to avoid publicity that might jeopardize his right to a fair trial. The closure order operated so as to prohibit the press from entering pre-trial hearings regarding the admissibility at trial of statements allegedly made by the defendant to third parties and of evidence of defendant's

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<sup>13</sup> *Id.* at 765.

<sup>14</sup> *Id.* at 763.

<sup>15</sup> *Id.* at 764.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> 267 S.E.2d 544 (W.Va. 1980).



state of mind at the time these statements were made.

Relying on article III, sections 14 and 17 of the West Virginia Constitution, the West Virginia Supreme Court of Appeals found an independent right flowing to the public and press to attend pre-trial criminal proceedings.<sup>19</sup> Although *State ex rel. Varney v. Ellis*<sup>20</sup> had enunciated this view as it related to a public right to access in a trial,<sup>21</sup> *Herald-Mail* goes further by acknowledging that the press is clothed with the same constitutional right to access as the public, based on its special status of gatherer and distributor of information.<sup>22</sup> The court relies on *State ex rel. Daily Mail Publishing Co. v. Smith*<sup>23</sup> for the proposition that "a robust, unfettered and creative press is indispensable to government by free discussion and to the intelligent operation of a democratic society."<sup>24</sup>

In addition, *Herald-Mail* extends the *Varney* right of public access to criminal proceedings to encompass pre-trial hearings.<sup>25</sup> Expanding the state constitutional mandate that trials of crimes be public, the West Virginia court determined that the term "trial" cannot be viewed in its limited sense. A pre-trial hearing often is similar to a trial without a jury in that witnesses are sworn in, evidence is heard, and the judge must apply the law to the facts. For these reasons, the high court found that the press must have the same right to access to pre-trial hearings as in a

<sup>19</sup> *Id.* at 547. art. III, § 14 of the West Virginia Constitution provides in pertinent part:

Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offence was committed, unless upon petition of the accused, and for good cause shown, it is removed to some other county. . . .

art. III, § 17 provides: "The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay."

<sup>20</sup> 149 W. Va. 522, 142 S.E.2d 63 (1965).

<sup>21</sup> *Id.* at 523, 142 S.E.2d at 65. The court held that a judgment rendered pursuant to a trial held in a jailer's office was void in that it violated art. III, § 14 of the public access clause of the West Virginia Constitution.

<sup>22</sup> 267 S.E.2d at 549.

<sup>23</sup> 248 S.E.2d 269 (W. Va. 1978), *aff'd*, 443 U.S. 97 (1979).

<sup>24</sup> *Id.* at 272.

<sup>25</sup> 267 S.E.2d at 550.

trial.<sup>26</sup>

The *Herald-Mail* majority does not go so far as to allow the press an unfettered right to attend pre-trial hearings.<sup>27</sup> If a showing of widespread adverse publicity amounting to a clear likelihood of irreparable damage to the defendant's right to a fair trial can be made out, the trial court could close a pre-trial hearing to the press.<sup>28</sup> Factors bearing on the issue of irreparable damage include "the extent of prior hostile publicity, the probability that the issues involved at the pre-trial hearing will further aggravate the adverse publicity, and whether traditional judicial techniques to insulate the jury from the consequences of such publicity will ameliorate the problem."<sup>29</sup> Because the Hardy County Circuit Court ordered a closure of a pre-trial hearing without the requisite showing of irreparable damage to defendant's right to a fair trial, the West Virginia court issued a moulded writ prohibiting the enforcement of the trial court's closure order, but enabling the trial court to hold a further hearing on closure in which the above-stated test should be applied.<sup>30</sup>

In addition to irreparable damage closure, the court made a subdued reference to "special circumstances" which might necessitate closure of a pre-trial hearing.<sup>31</sup> Although the court did not elaborate, "special circumstances" may translate to those situations in which confidential criminal investigatory materials are involved.<sup>32</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> Justice McGraw, in his concurring opinion, would not place any limitations on the press' right to access to a pre-trial hearing. "The right of access to governmental proceedings and the right to a fair trial do not conflict. The judicial article of the Constitution charges this Court to devise procedures and remedies to ensure fair trials." *Id.* at 552.

<sup>28</sup> *Id.* at 551.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 552.

<sup>31</sup> *Id.* at 551, n. 17.

<sup>32</sup> See *United States v. Ruiz-Estrella*, 481 F.2d 723 (2d Cir. 1973) (exclusion of public and defendant from that part of a pre-trial suppression hearing dealing with confidential federal hijacking "profile" does not abridge constitutional rights); *United States v. Cianfrani*, 573 F.2d 835 (3d Cir. 1978) (closure of suppression hearing regarding intercepted communications under title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, et seq., is justifiable limitation of public access to criminal proceeding).

*Herald-Mail* was decided almost one year subsequent to *Gannett Co., Inc. v. DePasquale*,<sup>33</sup> a United States Supreme Court decision based on similar facts but in which a plurality reached the opposite result. *Gannett* held that the sixth amendment to the Federal Constitution conferred a right to a public trial only upon the accused and not on the public or press.<sup>34</sup> Consequently, the Supreme Court decided the press has no independent sixth amendment right to attend a pre-trial hearing.<sup>35</sup>

*Gannett* acknowledged that some state constitutions provide for an independent public right to trial proceedings, but reiterated that no such right exists in the sixth amendment of the Federal Constitution. *Herald-Mail* reviewed each of the state constitutions that embodied the English common law rule of open proceedings and concluded that the uniform interpretation in those states was that the constitutional language conferred an independent right on the public to attend judicial proceedings, and did not simply confer a personal right upon the defendant to demand a public proceeding.<sup>36</sup>

The West Virginia Supreme Court of Appeals acknowledged that the competing interests and rights of litigants and the press were such as to make it an impossible task to foresee all of the repercussions of *Herald-Mail*. The complex nature of constitutional rights would appear to mandate a clarification of those competing interests in future decisions.

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<sup>33</sup> 443 U.S. 368 (1979).

<sup>34</sup> *Id.* at 391.

<sup>35</sup> However, the press and public do have first and fourteenth amendment rights under the Federal Constitution to attend criminal trials. See *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980) (*Gannett* distinguished).

<sup>36</sup> 267 S.E.2d at 548.

## CONTRACTS

Implied and express warranties of merchantability as found in the Uniform Commercial Code have received varied interpretations due to the "open ended" drafting of the warranty provisions.<sup>1</sup> The West Virginia Supreme Court of Appeals recently interpreted these warranty provisions and accompanying sections<sup>2</sup> in *Mountaineer Contractors, Inc. v. Mountain State Mack, Inc.*<sup>3</sup> In this case, Mountaineer Contractors agreed to purchase four used bulldozers from Mountain State Mack, the appellant. The sales agreement was made after an officer of Mountaineer Contractors viewed the machines in a working condition, but when the appellant delivered the equipment, it was inoperative. Mountaineer Contractors sued on breach of contract and received a jury verdict.

On appeal, the seller raised two issues concerning the warranty provisions of the U.C.C. and also questioned the assessment of damages arising from the breach. The Supreme Court of Appeals affirmed finding both an implied and express warranty of merchantability and held claims for incidental and consequential damages to be appropriate due to special circumstances.

When the buyer observed the bulldozers, he agreed with the agent of the appellant that the equipment was in good working order. Following this cursory inspection, the appellant offered for review the service records of the equipment; the buyer declined to examine them. The appellant contended that this examination and refusal to inspect the service records waived the implied warranty of merchantability as a matter of law.<sup>4</sup>

In construing the "modification of warranty" section of the U.C.C.<sup>5</sup> the court held that where there is evidence to support an

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<sup>1</sup> J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE, 8 (2d ed. 1980).

<sup>2</sup> W. VA. CODE §§ 46-2-202, 313, 314, 316, 714, 715 (1966).

<sup>3</sup> 268 S.E.2d 886 (W.Va. 1980).

<sup>4</sup> W. VA. CODE §§ 46-2-314, -316(3)(b) (1966).

<sup>5</sup> W. VA. CODE § 46-2-316 (1966).

inference that the defects arose after the buyer's examination, the issue of whether this examination constituted a waiver is a question of fact. Concerning the refusal to examine the service records, Justice McGraw, speaking for the court, concluded "[t]he Code clearly refers only to the buyer's refusal to inspect the goods themselves" and the refusal to examine the service records would not act as waiver of implied warranty of merchantability.<sup>6</sup>

This decision departs from early West Virginia cases concerning the existence of an implied warranty of merchantability where the sale is of a definite existing chattel capable of being inspected.<sup>7</sup> In that line of cases the court espoused the doctrine of "caveat emptor" with the only exception arising when the vendee has had no opportunity to inspect the property before purchase.<sup>8</sup> The West Virginia court, in 1968, began its retreat from the doctrine of "caveat emptor" in a case in which the dispute preceded the enactment of the U.C.C. Influenced by the Code, the court held that an inspection or opportunity for inspection does not necessarily preclude an implied warranty against latent defects.<sup>9</sup>

The agreement of sale in *Mountaineer Contractors* was reduced to writing in a security agreement which included a merger clause and was signed by the buyer. Upon delivery of the faulty bulldozers, the buyer immediately informed the seller that he would not accept the equipment in its present state. The seller agreed to assume the cost of all expenses incurred for repair, thus effecting an acceptance from the buyer.

In examining the pertinent language of West Virginia Code § 46-2-202,<sup>10</sup> the court interpreted the provision to exclude

<sup>6</sup> 268 S.E.2d at 890.

<sup>7</sup> See, e.g., *Watkins v. Angotti*, 65 W. Va. 193, 63 S.E. 969 (1909); *Lambert v. Armentrout*, 65 W. Va. 375, 64 S.E. 260 (1909); *Hood v. Bloch*, 29 W. Va. 244, 11 S.E. 910 (1886).

<sup>8</sup> See *Wilson v. Wiggins*, 73 W. Va. 560, 81 S.E. 842 (1914).

<sup>9</sup> *Nettles v. Imperial Distributors, Inc.*, 152 W. Va. 9, 159 S.E.2d 206 (1968).

<sup>10</sup> (1966). Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement . . . . (official comment).

"evidence of oral terms only in the case of agreements made contemporaneously with the transaction embodied in the written agreement."<sup>11</sup> The court then held that where a buyer accepts defective goods in reliance upon a promise to repair, such promises constitute express warranties.<sup>12</sup> The court reasoned that subsequent assertions made by the seller constituted a subsequent oral modification of the contract and thus would not be excluded as evidence by the parol evidence rule.

Involved in the court's analysis of the existence of express warranties was the aspect of reliance on the seller's assertions. However, West Virginia Code § 46-2-313<sup>13</sup> requires only that the promise become "part of the basis of the bargain." This suggests that reliance need not be shown to prove the existence of an express warranty;<sup>14</sup> all that would need to be shown is an affirmation by the seller which is false.

In examining the existence of an express warranty, the West Virginia court did not address the issue of the Statute of Frauds. This statute requires that the sale of goods for a price of \$500.00 or more must be in writing.<sup>15</sup> Whether the oral subsequent modification would fall under this statute is a question open to some debate, but the appellant failed to raise the issue.<sup>16</sup>

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<sup>11</sup> 268 S.E.2d at 892.

<sup>12</sup> *Id.*

<sup>13</sup> (1966).

<sup>14</sup> See, e.g., *Interco, Inc. v. Randustrial Corp.*, 533 S.W.2d 257 (Mo. App. 1976); *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973); W. VA. CODE § 46-2-313 (1966). Comment three of this section states that, "In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements needs to be shown in order to weave them into the fabric of the agreement."

<sup>15</sup> W. VA. CODE § 46-2-201 (1966).

<sup>16</sup> W. VA. CODE § 46-2-209 (1966) states that an agreement modifying a contract needs no consideration; however, the requirement of the Statute of Frauds (§ 46-2-201) must be satisfied if the contract is to be modified within its provisions. In *Mountaineer Contractors* there was an oral modification to the sales agreement which could arguably be in excess of \$500.00. Applying the Statute of Frauds, such a modification could not be made orally. However, W. VA. CODE § 46-2-209(4) states that if the modification is not valid as against the Statute of Frauds it can operate as a waiver of the original terms in the contract. It is not clear how such a waiver would operate where the modification involved, as it did in *Mountaineer Contractors*, contains terms unrelated to those in the

On the issue of damages, the trial court instructed the jury that it may consider money spent by the buyer for parts and labor used in repairing the bulldozers and any loss sustained by the inability to use the equipment.<sup>17</sup> The West Virginia court affirmed this instruction, stating that the usual measure of damages is not intended to be exclusive. The court found "special circumstances" existed in this case which permitted the recovery of incidental and consequential damages proximately resulting from the breach.<sup>18</sup> This holding is consistent with the trend of recent cases dealing with a seller's breach and the resulting damages to the buyer.<sup>19</sup> Lost profits proximately caused by seller's breach are also not uncommon and have been recoverable in a majority of jurisdictions dealing with this issue in the last few years.<sup>20</sup>

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original agreement.

<sup>17</sup> 268 S.E.2d at 893.

<sup>18</sup> The "special circumstances" were that the transaction took place during the "coal boom" of 1974, and at that time it was nearly impossible to purchase mining equipment of any kind, either new or used.

<sup>19</sup> See *Bill Branch Chevrolet, Inc. v. Redmond*, 378 So.2d 319 (Fla. 1980); *Coyle Chevrolet Co. v. Carrier*, 397 N.E.2d 1283 (Ind. 1979); *Alliance Tractor v. Lukens Tool & Die Co.*, 204 Neb. 248, 281 N.W.2d 778 (1979).

<sup>20</sup> See, e.g., *Lewis v. Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971).

## CRIMINAL LAW AND PROCEDURE

In the past year the West Virginia Supreme Court of Appeals has dealt extensively with issues raised in the area of criminal law. The court has recently decided several cases in each of the following categories: double jeopardy; evidentiary issues; juvenile dispositions; and post conviction problems. Many, if not most, of the cases involve constitutional challenges to existing West Virginia law and procedure. In its disposition of the issues raised, the court appears to be furthering the trend of affording the criminally accused greater substantive protection and more procedural rights.

### I. DOUBLE JEOPARDY

In *State ex rel. Dowdy v. Robinson*<sup>1</sup> the defendant was charged with breaking and entering a building. The address was listed in the indictment as "220 22nd Street." However, the proof adduced at trial by the prosecution showed that the actual address of the building was 200 22nd Street. The defendant argued at trial that this constituted a fatal variance between the indictment and the proof and moved for a directed verdict of acquittal. The trial court sustained the motion, over objection, and directed the jury to find the defendant not guilty.

Several months later the defendant was again charged with breaking and entering, but this time the indictment listed the correct address adduced by the prosecution at the previous trial. The defendant then sought a writ from the West Virginia Supreme Court of Appeals to prohibit the circuit court from trying him again on the grounds that he was being tried a second time for the same offense in contravention of the double jeopardy provisions of the United States and West Virginia Constitutions.

The double jeopardy provisions contained in the fifth amendment of the United States Constitution and in article III, section 5 of the West Virginia Constitution prohibit both multiple trials

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<sup>1</sup> 257 S.E.2d 167 (W. Va. 1979). See Comment, *supra*, p. 259.



and multiple punishments for the "same offense."<sup>2</sup> The threshold issue, then, in any double jeopardy inquiry is the manner in which "same offense" is to be defined. In *Blockburger v. United States*<sup>3</sup> the United States Supreme Court adopted the "same evidence" test for defining the fifth amendment phrase "same offense" when applied to multiple counts in one trial. The test was stated as "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not."<sup>4</sup> This test was extended to apply to multiple prosecutions as well as multiple counts in *Brown v. Ohio*.<sup>5</sup> Thus the basic issue in *Dowdy*, whether both indictments charged the "same offense," could easily have been resolved by reference to the *Blockburger* test.

However, Chief Justice Neely recognized that the West Virginia court may formulate its own standard under the West Virginia Constitution so long as minimum federal constitutional standards are adhered to. Thus, he seized upon the "same transaction" test explained in the concurring opinion of Justice Brennan in *Brown*,<sup>6</sup> and the policy enunciated in *Green v. United States*,<sup>7</sup> to formulate a new rule for defining "same offense" for double jeopardy purposes.

The rule adopted in *Dowdy* is that the court will use both the "same evidence" test and the "same transaction" test for deter-

<sup>2</sup> *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Conner v. Griffith*, 238 S.E. 2d 529 (W. Va. 1977).

<sup>3</sup> 284 U.S. 299 (1932).

<sup>4</sup> *Id.* at 304.

<sup>5</sup> 432 U.S. 161 (1977).

<sup>6</sup> Justice Brennan urged adoption of a rule holding that "all charges growing out of conduct constituting a 'single criminal act, occurrence, episode, or transaction' must be tried in a single proceeding." *Id.* at 170, quoting *Ashe v. Swenson*, 397 U.S. 436, 453 (1970) (Brennan, J., concurring).

<sup>7</sup> 355 U.S. 184 (1957). The policy is thus stated:

The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. 355 U.S. at 187.

mining whether the "same offense" is involved for double jeopardy purposes, with the accompanying requirement that whichever test affords the defendant greater protection must be applied. Applying the "same transaction" test to the facts of *Dowdy*, the court agreed with the defendant's claim of unconstitutional double jeopardy.

A possible source of confusion in the *Dowdy* decision is that its facts do not appear to warrant application of the "same transaction" test. Justice Brennan first urged adoption of the "same transaction" test in *Ashe v. Swenson*.<sup>8</sup> In that case four men robbed six poker players. After one of the accused was acquitted of robbing one of the poker players, he was tried for having robbed another poker player. The "same transaction" test was suggested by Brennan in response to the "tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes . . . [that permit] multiple prosecutions for an essentially unitary criminal episode,"<sup>9</sup> and the inability of the "same evidence" test to prohibit "multiple prosecutions where a single transaction is divisible into chronologically discrete crimes."<sup>10</sup> No such considerations exist, however, under the facts of *Dowdy*, and existing double jeopardy principles could have prevented retrial of the defendant. Thus, the court's use of the "same transaction" test in these circumstances—where there is clearly only one criminal act on the part of the defendant—could result in confusion on the part of those attempting to apply the test in the future.

In addition to formulating the new rule, the *Dowdy* decision also held West Virginia Code § 61-11-14<sup>11</sup> unconstitutional. This section permitted reindictment and trial of a person acquitted of an offense on the grounds of a variance between the allegations and the proof. The court noted that one clear principle which has emerged from recent United States Supreme Court opinions is that after a judgment acquitting a defendant, no retrial on the same offense is permissible no matter how erroneous the acquittal might have been.

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<sup>8</sup> 397 U.S. 436 (1970).

<sup>9</sup> *Id.* at 452 (Brennan, J., concurring).

<sup>10</sup> *Id.* at 451 (Brennan, J., concurring).

<sup>11</sup> (1977 Replacement Vol.).

Justice Miller, in dissent, completely disagreed with the majority's disposition of the case. He conceded that the defendant could not be retried if he had been acquitted, but asserted that no acquittal was present in this case. Miller would define acquittal as a "resolution, correct or not, of some or all of the factual elements of the offense charged,"<sup>12</sup> and stated that when, as here, there is no finding of a failure of proof of an essential element of the offense charged, no double jeopardy inquiry is necessary.<sup>13</sup>

The confusion created by the *Dowdy* decision was acknowledged by the supreme court of appeals in *State ex rel. Johnson v. Hamilton*.<sup>14</sup> Chief Justice Neely, again writing for the majority, stated in *Johnson* that the *Dowdy* rule "was intended to establish an orderly, prospective procedure for avoiding multiple prosecutions for successive criminal acts arising out of the same general criminal transaction."<sup>15</sup> Regarding the nature of the "same transaction" component of the *Dowdy* rule, Neely explained that the "same transaction" test "goes to the issue of multiple trials for

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<sup>12</sup> *State ex rel. Dowdy v. Robinson*, 257 S.E.2d 167, 172 (W. Va. 1979) (Miller, J., dissenting) quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1978).

<sup>13</sup> The majority opinion agrees with Miller's position to the extent that the trial judge should not have directed a verdict of acquittal because of the variance between the indictment and the proof. Rather, the correct procedure would have been either to strike the address in the original indictment as surplusage on the ground that the remainder of the indictment fully informed the defendant of the charges against him, or to grant a mistrial for manifest necessity. However according to the majority, once a verdict of acquittal is entered, the court must treat it as valid no matter how erroneous its grounds for "the Supreme Court has accorded magic to a directed verdict of acquittal which we cannot escape." 257 S.E.2d at 171.

<sup>14</sup> 266 S.E.2d 125 (W. Va. 1980). In *Johnson* the defendant was accused of the murder of a father and son during the same general criminal transaction. He was charged in two separate indictments. After he was convicted of first-degree murder of the son, the defendant sought a writ of prohibition to prohibit a second trial for the murder of the father. The *Dowdy* rule would clearly have prohibited a second trial, however, the first trial occurred two months before the *Dowdy* opinion was handed down. Therefore, the basic issue was whether the *Dowdy* opinion was to be applied retroactively. The supreme court of appeals recognized that the reliance of the prosecution on the then state of the law (which would have permitted separate trials) is an important element in considering whether to apply the rule retroactively, and that no substantial impairment of the truth finding function was involved (citing *Williams v. United States*, 401 U.S. 646 (1971)). The court decided that retroactive application of the *Dowdy* rule was not required.

<sup>15</sup> *Id.* at 128 (emphasis added).

the 'same offense' but it does not preclude separate punishments for separate crimes."<sup>16</sup> Justice Miller argued in his concurring opinion that this position completely ignores the fundamental issue of how to define "same offense" for double jeopardy purposes. If the "same transaction" test does not preclude separate punishments for the charges it requires to be consolidated in one trial, then it has nothing to do with double jeopardy, for the double jeopardy clause prohibits both multiple trials and multiple punishments. If the defendant can be punished twice, then he is not being punished for the "same offense" and the double jeopardy clause does not attach. Thus, Justice Miller would conclude that the "same transaction" test appears merely to establish a rule of joinder procedure that is wholly divorced from the double jeopardy inquiry.<sup>17</sup>

The operation of the *Dowdy* "same transaction" test, as modified by *Johnson*, is explained by the court with an example resembling the facts of *Johnson*:

In a case involving murders, such as the one currently under consideration, we hold that in the future<sup>18</sup> a person must be tried for both alleged murders in the same trial unless he moves for a severance,<sup>19</sup> but that he may be punished for both murders separately because they are separate and distinct offenses.<sup>20</sup>

This statement reinforces the notion that the "same transaction" test is unrelated to the double jeopardy definition of "same offense," but only establishes a rule of joinder procedure. For if the two murders in Chief Justice Neely's example are "separate and distinct offenses" the double jeopardy proscription against multiple trials would have no application. The "same transaction" test then does not define "same offense" for double jeopardy purposes; it only indicates when separate offenses must be tried together.<sup>21</sup>

<sup>16</sup> *Id.* (emphasis added).

<sup>17</sup> *Id.* (Miller, J., dissenting).

<sup>18</sup> See generally note 14, *supra*.

<sup>19</sup> A motion for severance by the defendant contemplates an automatic waiver of a subsequent plea of double jeopardy. 266 S.E.2d at 129.

<sup>20</sup> *Id.* at 128 (footnotes added).

<sup>21</sup> As a practical matter the *Dowdy-Johnson* "same transaction" test affords the criminally accused greater protection only to the extent that the state fails to

As a result of the *Johnson* opinion, the law of double jeopardy appears to be in basically the same position it was prior to the *Dowdy* decision regarding the definition of "same offense." The "same evidence" test will be applied to determine whether the "same offense" is involved in the alleged multiple trials or punishments. Under *Johnson*, the "same transaction" test serves only to compel the state to prosecute in a single proceeding all the charges against a defendant arising out of the same criminal episode.

One problem which should be solved by the *Dowdy* and *Johnson* decisions is the one presented by *State ex rel. Leonard v. Hey*.<sup>22</sup> The defendant in *Leonard* was indicted in 1967 for murder and robbery. He pled guilty to murder and was sentenced to life in the penitentiary without mercy. In 1974 his sentence was commuted to life with mercy. Consequently, he became eligible for parole in 1979, but he was then indicted for a malicious wounding that allegedly occurred in the same criminal episode that resulted in the 1967 indictments.<sup>23</sup> The trial court denied the defendant's motion to quash the indictment. Subsequently he sought a writ of prohibition from the supreme court of appeals to prohibit his further prosecution on the basis that the indictment violated his double jeopardy, speedy trial, and due process rights. The court held, in an opinion written by Justice Harshbarger, that the eleven year delay between arrest and indictment was presumptively prejudicial to the defendant and violated his right to due process of law, but because the presumption is rebuttable the court remanded the case to give the state an opportunity to prove the delay reasonable.

In determining whether the eleven year delay between arrest and indictment involved in *Leonard* violated due process, the court considered various opinions of the United States Supreme Court. Although many courts have interpreted *United States v.*

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prosecute separate crimes arising from the "same transaction" in one trial. If the state brings all its charges in a single proceeding the defendant may move to sever the charges, but by so moving he waives future double jeopardy objections.

<sup>22</sup> 269 S.E.2d 394 (W. Va. 1980).

<sup>23</sup> This situation should not occur in the future because the *Dowdy* rule requires all of the crimes arising out of the same general transaction to be prosecuted in a single proceeding.

*Marion*<sup>24</sup> as establishing the criteria for when prosecutorial delay constitutes a violation of due process,<sup>25</sup> the *Leonard* court did not read *Marion* as establishing any "universally applicable tests."<sup>26</sup> The court did find pertinent and helpful Justice Brennan's opinion in *Dickey v. Florida*,<sup>27</sup> where it is suggested that governmental delay be tested by weighing the importance of the postponement with the length of the delay and its potential for prejudice.<sup>28</sup>

A similar balancing approach is contained in syllabus point two of the *Leonard* decision wherein the trial court is directed to weigh "the reasons for delay against the impact of the delay upon the defendant's ability to defend himself."<sup>29</sup> However the court cautions that such a balancing test is "suspect, because it puts to judicial subjective judgment, with its consequential risks of overlooking or undervaluing important matters, the liberty of people."<sup>30</sup> The court did not apply the balancing test to the facts of *Leonard* because it determined that an eleven year delay constitutes *prima facie* prejudice to the defendant and an infringement upon his due process rights.<sup>31</sup>

*State ex rel. Kincaid v. Spillers*<sup>32</sup> is a case which closely resembles the facts of *Dowdy*. In *Kincaid* the defendant was indicted and convicted for burglary. He then moved for a judgment of acquittal because of a fatal variance between the indictment and the proof. The trial court granted his motion and entered judgment. However, upon reconsidering, the court overruled its order and reinstated the jury verdict during the same term. The

<sup>24</sup> 404 U.S. 307 (1971).

<sup>25</sup> Some courts interpreting *Marion* "have held that a violation of due process only occurs if there is actual, substantial prejudice and intentional prosecutorial misconduct; others, that the existence of one of the factors can deny a defendant due process." 269 S.E.2d at 396 (emphasis by the court).

<sup>26</sup> *Id.*

<sup>27</sup> 398 U.S. 30 (1970).

<sup>28</sup> *Id.* at 52 (Brennan, J., concurring).

<sup>29</sup> 269 S.E.2d at 394.

<sup>30</sup> *Id.* at 398.

<sup>31</sup> Justice Miller, concurring, is in agreement with the majority's decision to place the burden on the state to justify the delay. He points out that to "force the defendant to bear the burdens of an eleven-year preindictment delay . . . would be to improperly allow the prosecution to override the court's authority to impose concurrent sentencing, the Governor's authority to commute, and the parole board's authority to parole." 269 S.E.2d at 401 (Miller, J., concurring).

<sup>32</sup> 268 S.E.2d 137 (W. Va. 1980).

defendant subsequently petitioned the supreme court of appeals contending that revocation of the acquittal order violated his double jeopardy rights.

Despite its apparent similarity, this case is easily distinguished from *Dowdy*, since here there is no necessity for a second trial. A claim of double jeopardy under these circumstances—where there is no danger of multiple trials or multiple punishments—is simply inappropriate. The thrust of the defendant's argument must then rest on the proposition that the trial court lacked the jurisdiction to set aside its order of acquittal.

There are two limitations to a trial court's ability in a criminal case to set aside a judgment during the same term at which the judgment was entered. It may do so if the defendant has not satisfied in whole or in part the judgment and if no increase in the penalty imposed is involved.<sup>33</sup> In the present case the first limitation is not applicable, and the second is not offended because there is "no increase in the penalty when the court simply reinstates the jury's finding of guilty."<sup>34</sup> Accordingly the court denied the petitioner's writ.

In short, the *Kincaid* case is a clarification of what constitutes an "acquittal" for double jeopardy purposes. *Dowdy* recognized that double jeopardy could have been avoided if the trial judge, rather than directing a verdict of acquittal, had corrected the variance between the indictment and proof by means of surplusage or manifest necessity.<sup>35</sup> Here the trial judge effected the same result by reinstating the jury verdict during the same term, and the directed verdict of acquittal was not "accorded magic."<sup>36</sup>

Since the *Kincaid* court recognizes that "reversal by a trial court itself . . . does not offend double jeopardy principles"<sup>37</sup> where the defendant will not be subjected to multiple trials, its statement "that a defendant who challenges conviction by appeal or post-verdict motion voluntarily subjects himself to reconsider-

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<sup>33</sup> *Id.* at 141-42 citing *State ex rel. Williams v. Riffe*, 127 W. Va. 573, 34 S.E.2d 21 (1945) and *State ex rel. Roberts v. Tucker*, 143 W. Va. 114, 100 S.E.2d 550 (1957).

<sup>34</sup> 268 S.E.2d at 142.

<sup>35</sup> See note 13, *supra*.

<sup>36</sup> See *State ex rel. Dowdy v. Robinson*, 257 S.E.2d 167, 171 (W. Va. 1979).

<sup>37</sup> 268 S.E.2d at 141.

ation of matters that involve jeopardy to his liberty," and "[b]y so choosing . . . waives his double jeopardy rights,"<sup>38</sup> could be viewed as dicta and not as a substantive change in double jeopardy law.

## II. EVIDENCE

*State v. Rowe*<sup>39</sup> established, for the first time, specific guidelines for admission in criminal trials of photographs depicting gruesome, or revolting physical injuries. Before *State v. Rowe* was decided, admission of such photographs in West Virginia was solely within the discretion of the trial judge, whose decision was upheld on appeal absent a clear showing of abuse of that discretion.<sup>40</sup>

Generally, trial judges had been determining the admissibility of arguably prejudicial photographs by considering the materiality and relevancy of the scene depicted.<sup>41</sup> These considerations did not, however, preclude the admission of "gruesome" photographs solely on the basis of their possible inflammatory impact on the jury.<sup>42</sup> Rather, the court performed a balancing test between the advantages of admitting all evidence having probative value and the possible detriment to the criminal defendant's right to an impartial, uninflamed jury.<sup>43</sup>

In *Rowe*, the West Virginia Supreme Court of Appeals held that admission of photographs deemed to be "gruesome"<sup>44</sup> required a showing by the prosecution, not only of probative value, but of "essential evidentiary value."<sup>45</sup> The court rested this holding on the assumption that photographs whose impact "may"

<sup>38</sup> *Id.* at 141.

<sup>39</sup> 259 S.E.2d 26 (W. Va. 1979).

<sup>40</sup> *State v. Sette*, 242 S.E.2d 464 (W. Va. 1978); *State v. Wooldridge*, 129 W. Va. 448, 40 S.E.2d 899 (1946).

<sup>41</sup> *State v. Sette*, 242 S.E.2d 464 (W. Va. 1978).

<sup>42</sup> *See, e.g.*, *State v. Whitt*, 129 W. Va. 187, 40 S.E.2d 319 (1946) ("ghastly" photos admitted without analysis); *State v. Goins*, 120 W. Va. 605, 199 S.E. 873 (1938) (photos of homicide victim admitted without analysis).

<sup>43</sup> *State v. Sette*, 242 S.E.2d 464 (W. Va. 1978).

<sup>44</sup> Facts relevant in determining if a photograph is "gruesome," include whether it depicts blood and gore (especially color photographs), contorted facial features, a victim's body after autopsy, or enlargements of bodily parts emphasizing revolting aspects. *State v. Rowe*, 259 S.E.2d 26, 28 (W. Va. 1979).

<sup>45</sup> *Id.* at 28.



prejudice or inflame the jury should be inadmissible unless they are essential to the state's case.<sup>46</sup> Photos which merely depict the condition of the victim were not of essential value, the court said, especially when expert testimony was available upon these issues.<sup>47</sup>

The court did note that grisly photographs are not *per se* inadmissible. Once there has been a preliminary finding that the photographs are gruesome, a presumption of inflammatory effect attaches, shifting the burden to the prosecution to show "essential evidentiary value" to protect the criminal defendant from a prejudiced decision.<sup>48</sup>

*State v. Brewster*<sup>49</sup> addressed the issue of whether a criminal defendant may be physically restrained with manacles during a jury trial, and if so, under what circumstances. Prior to this decision, *State v. Allen*<sup>50</sup> held that where the record was silent as to the necessity for retaining manacles upon the prisoner, an appellate court would presume the court below exercised sound and reasonable discretion in allowing such restraint.

*State ex rel. McMannis v. Mohn*<sup>51</sup> recently addressed the analogous issue of whether a criminal defendant could be compelled to appear in court clad in prison uniform. Citing *Estelle v. Williams*,<sup>52</sup> in which the United States Supreme Court held there was a constitutional right to wear unidentifiable non-prison clothing, the West Virginia court acknowledged that the criminal defendant can be substantially prejudiced by being forced to appear before the jury marked as a prisoner.<sup>53</sup>

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<sup>46</sup> *Id.* Other authority cited included: *Young v. State*, 234 So.2d 341 (Fla. 1970); *State v. Clark*, 218 Kan. 18, 542 P.2d 291 (1975); *Breshers v. State*, 572 P.2d 561 (Okla. 1977); *Commonwealth v. Hubbard*, 472 Pa. 259, 372 A.2d 687 (1977). One photograph in *State v. Rowe* was upheld as admissible upon this appeal because its essential evidentiary value was demonstrated by the need to compare a bloody heel print in one photo to the soles of defendant's shoes.

<sup>47</sup> 259 S.E.2d at 29, citing with approval *Commonwealth v. Chacko*, 480 Pa. 504, 391 A.2d 999 (1978).

<sup>48</sup> 259 S.E.2d at 28.

<sup>49</sup> 261 S.E.2d 77 (W. Va. 1979).

<sup>50</sup> 45 W. Va. 65, 30 S.E. 209 (1898).

<sup>51</sup> 254 S.E.2d 805 (W. Va. 1979).

<sup>52</sup> 425 U.S. 501 (1976).

<sup>53</sup> 254 S.E.2d at 809-10.

The court in *Brewster* felt the position enunciated in *McMannis* was not inconsistent with the general rule disapproving restraints established in *Allen*. The court stated, however, that since the verdict in a criminal trial is substantially affected by the defendant's outward appearance of credibility, some evidence must be placed in the record showing that some immediate necessity existed for the use of restraints.<sup>54</sup> In order that this required showing be observed, the court overruled *Allen* to the extent that no presumption of a sound exercise of discretion would henceforth be made where no evidence of necessity had been placed in the record.<sup>55</sup>

With regard to showing necessity, the *Brewster* court adopted nine factors set forth in the A.B.A. Advisory Committee Comments on Criminal Trials<sup>56</sup> including such considerations as the gravity of the present charge, the person's character and past record, threats to cause disturbance, and risk of mob violence, among others.

Defendant *Brewster* argued to the court that his freedom to appear without manacles should be elevated to the status of a constitutional right, relying on the holding in *Estelle v. Williams*. The court disagreed with this contention, however, stating that while the wearing of prison clothing in court serves no useful state purpose, there were certain circumstances which would justify the use of restraints at trial, and that the required showing of necessity adequately insured defendant's substantive rights.<sup>57</sup>

*State v. Lawson*<sup>58</sup> held that a criminal defendant accused of rape is entitled to evidence in the form of blood grouping test results where the victim becomes pregnant and claims the rape was her sole act of intercourse. Since the test results might provide definite exculpatory evidence, the *Lawson* court held that the defendant is entitled to a continuance in order to obtain the

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<sup>54</sup> 261 S.E.2d at 81.

<sup>55</sup> *Id.* at 81-82. The court did not believe that the failure in this case to develop a record with regard to necessity for restraint required reversal; instead it remanded with directions to develop such evidence, with the stipulation that should the trial court make a finding of necessity, the verdict would be affirmed.

<sup>56</sup> "Standards Relating to Trial by Jury" at 96 n. 9 (Approved Draft, 1968).

<sup>57</sup> 261 S.E.2d at 81.

<sup>58</sup> 267 S.E.2d 438 (W. Va. 1980).

blood grouping test results.<sup>59</sup>

Despite this holding, the court in *Lawson* did not feel the trial court's refusal to grant a continuance warranted a reversal.<sup>60</sup> Using *State v. Brewster*<sup>61</sup> as authority, the court allowed a conditional remand. If the test results establish non-paternity, defendant's motion for a new trial would be granted.<sup>62</sup>

West Virginia Code § 17C-5A-5(c)<sup>63</sup> which provides that one tenth of one percent or more by weight of alcohol in a criminal defendant's blood shall establish prima facie evidence of intoxication, was found constitutional in *State v. Ball*.<sup>64</sup> Such a presumption does not offend notions of due process, the court said, since the blood-alcohol ratio is not an element of the crime of drunk driving, but merely provides a statutory definition of intoxication. Thus, West Virginia Code § 17C-5A-5(c)<sup>65</sup> does not relieve the prosecution of proving a material element of the offense charged;<sup>66</sup> it merely relieves the state of the burden of producing an expert at every trial to testify as to what effect a given percentage of alcohol would have upon the defendant's ability to drive.<sup>67</sup>

The *Ball* court declined to rest its holding upon principles applicable to presumptions for a second reason.<sup>68</sup> The court said

<sup>59</sup> See *People v. Tashman*, 233 N.Y.S.2d 744 (1962) and *People v. Bynon*, 146 Cal. App. 2d 7, 303 P.2d 75 (1956).

<sup>60</sup> 267 S.E.2d at 439.

<sup>61</sup> 261 S.E.2d 77 (W. Va. 1979).

<sup>62</sup> 267 S.E.2d at 440.

<sup>63</sup> (1974 Replacement Vol.).

<sup>64</sup> 264 S.E.2d 844 (W. Va. 1980).

<sup>65</sup> (1974 Replacement Vol.).

<sup>66</sup> See *State v. Pendry*, 227 S.E.2d 210 (W. Va. 1976).

<sup>67</sup> 264 S.E.2d at 846.

<sup>68</sup> *Id.* at 847. Chief Justice Neely, in footnote one, reviewed recent West Virginia and U.S. Supreme Court holdings with regard to statutory presumptions, but declined to elucidate upon the application of those principles to the facts of this case. The validity of a jury instruction indicating that possession of stolen property supports an inference of guilt was considered in *State v. Stone*, 268 S.E.2d 50 (W. Va. 1980). The court commented that so long as the trial judge informed the jury that possession was not of itself prima facie evidence of guilt, and was only to be considered in conjunction with other facts and circumstances of the case, an instruction stating that such "possession . . . is a circumstance tending to show that the possessor is a thief . . ." is constitutional. 268 S.E.2d at 55. Although a qualified instruction was not given in *Stone*, it is unclear what effect this had on

the blood-alcohol ratio would not be a presumption of guilt since the jury was entitled to disregard it if they found the person having the stated alcohol content in his blood was not in fact intoxicated. The "presumption" would merely support a jury verdict of guilty.<sup>69</sup>

### III. PROCEDURE

In *State v. Milam*<sup>70</sup> the West Virginia Supreme Court of Appeals explored the interrelationship between an insanity defense and the voluntariness of a confession in a criminal case. Since 1966 the rule in West Virginia has been that a confession must be voluntary and that its voluntariness must be established in an in camera hearing.<sup>71</sup> In *Milam* the trial court had held such a hearing to determine the voluntariness of the defendant's confession, but denied the defendant the opportunity to introduce psychiatric testimony at the hearing to show that his confession was involuntary because he was insane at the time he gave it.<sup>72</sup> The supreme court, relying on *Blackburn v. Alabama*,<sup>73</sup> held this to be error. *Blackburn* had held that where the defendant's sanity at the time he gave the confession is in issue, it is error to admit the confession without considering the sanity issue at the in camera hearing.

However, the *Milam* court did not read *Blackburn* as requiring that whenever the state seeks to introduce a confession it must produce evidence of sanity, because there is a presumption that a person is sane. This presumption disappears, however, once the defendant introduces some evidence of insanity, and the burden shifts to the state to prove his sanity by a preponderance of the evidence.

The court in *Milam* pointed out that the burden of proof on the issue of sanity at an in camera hearing to establish the voluntariness of a confession does not coincide with the burden of

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the court's decision to grant a new trial, since other fatal procedural defects were present.

<sup>69</sup> See, e.g., *Sandstrom v. Montana*, 442 U.S. 510 (1979).

<sup>70</sup> 260 S.E.2d 295 (W. Va. 1979).

<sup>71</sup> *State v. Fortner*, 150 W. Va. 571, 148 S.E.2d 669 (1966).

<sup>72</sup> The defendant's principal defense at trial was insanity.

<sup>73</sup> 361 U.S. 199 (1960).

proof at trial. Should the accused offer evidence at trial that he was insane, the presumption of sanity disappears, and the burden falls upon the state to prove beyond a reasonable doubt that the defendant was sane at the time he committed the offense.<sup>74</sup> To do otherwise would have the effect of requiring the defendant "to establish his innocence, by proving that he is not guilty of the crime charged."<sup>75</sup> However, the defendant's sanity, as it relates to the voluntariness of a confession, need only be established by a preponderance of the evidence at the in camera hearing.<sup>76</sup>

*State v. Haverty*<sup>77</sup> addressed the question whether a criminal defendant's sixth amendment right to call witnesses on his own behalf requires the state to grant immunity to a defense witness when he claims a fifth amendment privilege against self-incrimination.<sup>78</sup> The United States Supreme Court has yet to address this issue,<sup>79</sup> but a few jurisdictions<sup>80</sup> have determined that sixth amendment rights require immunity in order to make crucial exculpatory evidence available to the defendant in certain circumstances.<sup>81</sup>

West Virginia Code § 57-5-2<sup>82</sup> gives the trial court discretion to grant immunity when "the ends of justice may be promoted by

<sup>74</sup> See *Edwards v. Leverette*, 258 S.E.2d 436 (W. Va. 1979). The *Milam* court found that the state failed to carry this burden. The defendant offered the testimony of a doctor at trial to the effect that he was "probably" insane at the time he committed the offense. The failure of the state to produce any countervailing evidence was deemed fatal to its case. Moreover, the court concluded that the failure of the state to rebut the defendant's insanity beyond a reasonable doubt resulted in an evidentiary insufficiency that bars retrial under double jeopardy principles. See *Burks v. United States*, 437 U.S. 1 (1978) and *State v. Frazier*, 252 S.E.2d 39 (W. Va. 1979).

<sup>75</sup> *Davis v. United States*, 160 U.S. 469, 487 (1895).

<sup>76</sup> See *State v. Vance*, 250 S.E.2d 146 (W. Va. 1978); *State v. Starr*, 216 S.E.2d 242, 249 (W. Va. 1975), citing *Lego v. Twomey*, 404 U.S. 477 (1972).

<sup>77</sup> 267 S.E.2d 727 (W. Va. 1980).

<sup>78</sup> *Id.* at 731.

<sup>79</sup> *Id.* at 732.

<sup>80</sup> See, e.g., *Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980). For cases refusing to grant immunity under these circumstances, see 267 S.E.2d at 732.

<sup>81</sup> The conditions set forth in *Virgin Islands v. Smith*, 615 F.2d at 972, are that the witness be named, and particulars of his testimony be given; the witness be available; the defendant makes a convincing showing that the testimony is both clearly exculpatory and essential to his case, and testimony is not ambiguous, cumulative, or relating only to the credibility of government witnesses.

<sup>82</sup> (1966).

compelling such testimony or evidence." The West Virginia court did not rule upon whether § 57-5-2 could be activated by petition of the defendant or, as is the usual case, the prosecution,<sup>83</sup> because it found that the defendant had in any case failed to make the showing required under *Virgin Islands v. Smith*,<sup>84</sup> which he had cited.

The court did not expressly reject this application of the statute, but it did indirectly disapprove it by noting that such a holding would bring on an "immunity bath" for coparticipants in criminal activities.<sup>85</sup> Nevertheless, the fact that the court measured defendant's case against the standards set forth in *Virgin Islands v. Smith* indicated that a petition setting forth these requisites could provide the basis for adopting that rule.

#### IV. JUVENILE PROCEEDINGS

*State ex rel. S.J.C. v. Fox*<sup>86</sup> clarified guidelines for juvenile dispositions undertaken pursuant to West Virginia Code § 49-5-13.<sup>87</sup> This section requires that, should incarceration be ordered, the juvenile court make findings demonstrating that "no less restrictive alternative would accomplish the requisite rehabilitation of the child."<sup>88</sup> The West Virginia Supreme Court of Appeals voided a dispositional order for incarceration entered by the circuit court because it was deficient in the requisite "findings"<sup>89</sup> in that it failed to adequately demonstrate commitment to a secure

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<sup>83</sup> The *Haverty* court noted that one reason why this issue is not decided in the defendant's favor is that many immunity statutes provide for immunity only upon petition by the executive branch of the government. See, e.g., 18 U.S.C. §§ 6002-03 (1976). W. VA. CODE § 57-5-2, however, does not include language to this effect, but merely vests discretion to grant immunity in the trial court.

<sup>84</sup> 615 F.2d 964 (3d Cir. 1980). See notes 80 and 81, *supra*.

<sup>85</sup> 267 S.E.2d at 732.

<sup>86</sup> 268 S.E.2d 56 (W. Va. 1980).

<sup>87</sup> (Cum. Supp. 1980).

<sup>88</sup> W. VA. CODE § 49-5-13(b)(5) (Cum. Supp. 1980).

<sup>89</sup> The court cited *State v. M.M.*, 256 S.E.2d 549 at 556 (W. Va. 1979) for the definition of "finding" as that term should be construed in the language of W. VA. CODE § 49-5-13(b)(5). That case held that a "finding" is more than a finding of fact, but rather resembles a conclusion of law in that it bases itself on findings of fact (meaning statements of facts in evidence or facts properly inferable therefrom relating directly to factors required to be considered by statute) and should constitute "clear and convincing proof" of the conclusion drawn. 258 S.E.2d at 58 n.2.

facility to be the least restrictive alternative for rehabilitation.<sup>90</sup>

The circuit court had cited three facts in support of its order: The relator's codefendants were incarcerated; the relator had been on "unofficial" probation in an adjoining county on another offense; the offense with which relator was charged was a serious one.<sup>91</sup> The court found only one of these factors, the gravity of the offense, to be a proper consideration for a dispositional decision.

The court stated unequivocally that the sentences of the codefendants were immaterial to a determination of "least restrictive alternatives," since this inquiry is of necessity based upon the individual circumstances of each juvenile.<sup>92</sup> Further, the defendant's personal history upon which the disposition decision is based must include that period of time between the date of the offense and the date of the dispositional hearing.<sup>93</sup> The court did not comment directly on the previous "unofficial probation." It did, however, "question the propriety of considering alleged delinquent acts which have never been charged . . . ."<sup>94</sup>

The third factor, that of the gravity of the offense, the court held to be a proper consideration, but not one which, standing alone, would ever support an order of incarceration.<sup>95</sup> The principle carried throughout this opinion was that incarceration is a most extreme measure for juvenile disposition, one which will not be upheld as the "least restrictive alternative" unless express findings are made which are clearly supported by evidence in the record and which give no undue weight to impermissible factors.

*State ex rel. D. D. H. v. Dostert*<sup>96</sup> closely followed *State ex rel. S.J.C. v. Fox* and expanded on principles established and implied therein by setting forth a comprehensive scheme for inter-

<sup>90</sup> This holding reflects the extension to juvenile dispositions of *State ex rel. E.D. v. Aldredge*, 245 S.E.2d 849 (W. Va. 1978), in which the failure to make express findings rendered void an order to transfer a proceeding from juvenile to criminal jurisdiction. 268 S.E.2d at 58-59.

<sup>91</sup> *Id.* at 59.

<sup>92</sup> *Id.* at 59 n.3, citing *Walker v. Commonwealth*, 212 Va. 289, 183 S.E.2d 739 (1971).

<sup>93</sup> *Id.* at 61.

<sup>94</sup> *Id.* at 60.

<sup>95</sup> *Id.*

<sup>96</sup> 269 S.E.2d 401 (W. Va. 1980).

preting the recent statutory revisions in the juvenile law, in particular, the "least restrictive dispositional alternative."<sup>97</sup> *State ex rel. D.D.H. v. Dostert* undertook a philosophical examination of the goals behind disposition of juvenile offenders and set forth a detailed plan for implementation of the revised statutes and for coordination of the component parts of the process.

The court discussed the purposes behind the statute,<sup>98</sup> then balanced the competing interests of society for a crime-free environment, and of the child for protection of his "liberty interest." The court stated that offenses by juveniles result from one or both of two causes: environment and free will.<sup>99</sup> Although a state cannot hope to control each child's choices, the court said it can and should alter and improve that environment through dispositional decisions.<sup>100</sup>

Although West Virginia is "clearly committed to the rehabilitative model,"<sup>101</sup> the court's recognition of free will as a cause of juvenile delinquency and deference to the practicalities of law enforcement compelled it to leave open the alternative of incarceration in extreme cases of non-rehabilitable juveniles.<sup>102</sup> A child who shows "a consistent course of noncooperation, particularly when combined with a predilection to commit dangerous or destructive acts . . . justifies the court in resorting to commitment."<sup>103</sup>

The finding requirement imposed by *State ex rel. S.J.C. v. Fox* attempts to insure that no juvenile is committed to a secure facility unless the preceding standard is clearly shown, and supported by the evidence. To further insure that the least restrictive alternative for rehabilitation is chosen, the court explored the duties of juvenile justice system participants. Stringent and explicit requirements were imposed upon court-appointed counsel, the welfare worker, the court and the child.<sup>104</sup>

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<sup>97</sup> W. VA. CODE § 49-5-13(b) (Cum. Supp. 1980).

<sup>98</sup> W. VA. CODE § 49-1-1(a) (Cum. Supp. 1980).

<sup>99</sup> 269 S.E.2d at 411.

<sup>100</sup> *Id.* at 411-12.

<sup>101</sup> See *State ex rel. Harris v. Calendine*, 233 S.E.2d 318, 325 (W. Va. 1977).

<sup>102</sup> 269 S.E.2d at 410.

<sup>103</sup> *Id.* at 414.

<sup>104</sup> All of these responsibilities bear generally on the requirement that the least restrictive alternative be utilized: counsel is to locate alternatives, and take



## V. POST-CONVICTION PROCEEDINGS

During its 1979-80 term, the West Virginia Supreme Court of Appeals dealt with the problem of defining and clarifying due process requirements applicable to probation, parole and recidivist proceedings. While reaffirming its position, and that of the United States Supreme Court, that the revocation of probation or parole does not require the full panoply of rights due a person in a criminal proceeding,<sup>105</sup> the court stressed that: a preliminary probation revocation hearing must be afforded a probationer without unreasonable delay as soon as possible after his arrest,<sup>106</sup> the fourteenth amendment due process clause requires that a person be given written notice of alleged probation violations,<sup>107</sup> and in order to reach the West Virginia Supreme Court of Appeals for a probation revocation hearing, the person must come via habeas corpus.<sup>108</sup> The court also held that, because West Virginia's parole statute<sup>109</sup> creates a reasonable expectation interest in parole, the parole release interview must satisfy the following requirements: notice to the accused, access to information in his record, a personal appearance, a written record of the interview, and if parole is denied, a written statement of the reason(s) for such denial.<sup>110</sup> Juveniles are entitled to all the constitutional protections afforded an adult in parole revocation proceedings, and are given an additional measure of protection by a higher standard of proof than that required in adult parole revocation proceedings.<sup>111</sup> The due process clause of the fourteenth amendment also serves to

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initial steps toward having the juvenile admitted; the welfare worker is to ascertain whether the offenses have resulted from forces which the social service departments might correct; the court is to investigate and make findings; and the child is to make an affirmative obligation to cooperate. 269 S.E.2d at 412-15.

<sup>105</sup> *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Louk v. Haynes*, 223 S.E.2d 780 (W. Va. 1976).

<sup>106</sup> *State ex rel. Ostrander v. Wilt*, 262 S.E.2d 420 (W. Va. 1980).

<sup>107</sup> *State v. Fraley*, 258 S.E.2d 129 (W. Va. 1979).

<sup>108</sup> *Sigman v. Whyte*, 268 S.E.2d 603 (W. Va. 1980).

<sup>109</sup> W. VA. CODE § 62-12-13 (Cum. Supp. 1980).

<sup>110</sup> *Tasker v. Mohn*, 267 S.E.2d 183 (W. Va. 1980).

<sup>111</sup> *State ex rel. J.R. v. MacQueen*, 259 S.E.2d 420, 423 (W. Va. 1979). W. VA. CODE § 62-12-19 (1977 Replacement Vol.) provides that violation of parole by an adult may be proved if it appears to the "satisfaction of the board that the parolee has violated any condition" of his parole. W. VA. CODE § 49-5-14 (Cum. Supp. 1979) requires "clear and convincing proof of substantial violation" before a juvenile parole may be revoked.

protect an accused prosecuted as an habitual criminal. Where the person's identity in a recidivist proceeding is the key factual issue, he is entitled to the same right as the person in a criminal case not to be subjected to an unduly suggestive identification procedure.<sup>112</sup>

In construing the language of West Virginia's post-conviction bail statute,<sup>113</sup> the court has extended existing law and overruled in part the 1978 case of *Conley v. Dingess*,<sup>114</sup> which held that post-conviction bail was prohibited for persons convicted of armed robbery, inasmuch as they were subject to life imprisonment. A person convicted of armed robbery, but not sentenced to life imprisonment, may now be eligible for post-conviction bail under the statute.<sup>115</sup>

Finally, the court held that in order for a person to withdraw a guilty plea prior to sentencing, where breach of a plea bargain is not in issue, the person generally need only show any fair and just reason.<sup>116</sup> However, if the state can show that it will suffer substantial prejudice if the guilty plea is withdrawn, the court should consider such prejudice in determining whether to grant the motion to withdraw the guilty plea.

#### A. Probation Proceedings

In *State ex rel. Ostrander v. Wilt*,<sup>117</sup> the defendant had been placed on probation in June 1976, for three years upon certain terms and conditions. In January 1979, a petition was filed stating that the probationer was residing outside the state without the permission of the court, that he had been convicted of certain crimes and had failed to pay court costs. A warrant issued for his arrest, and he was returned to West Virginia on May 24, 1979.

The petitioner contended that he was denied due process in that the state failed to provide him with a preliminary and final revocation hearing prior to expiration of the probationary period and the state failed to provide him with a preliminary hearing for

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<sup>112</sup> *State v. Vance*, 262 S.E.2d 423 (W. Va. 1980).

<sup>113</sup> W. VA. CODE § 62-1C-1(b) (1977 Replacement Vol.).

<sup>114</sup> 250 S.E.2d 136 (W. Va. 1978).

<sup>115</sup> *State ex rel. Faircloth v. Catlett*, 267 S.E.2d 736 (W. Va. 1980).

<sup>116</sup> *State v. Olish*, 266 S.E.2d 134 (W. Va. 1980).

<sup>117</sup> 262 S.E.2d 420 (W. Va. 1980).

probation violations within a reasonable time.

The court found the lapse of time between the defendant's arrest and the hearing, forty-seven days, was largely due to the actions of petitioner and his counsel. Having determined this, the court then examined an ad hoc balancing test first set forth in *Barker v. Wingo*<sup>118</sup> which utilized three factors: length of and reason for the delay, probationer's assertion of his right, and prejudice to the defendant.<sup>119</sup> After weighing these three factors, the court found that, although the petitioner quickly asserted his right to a hearing, he alleged no prejudice caused by delay. The actions of his counsel delayed matters and there was even some question as to whether the petitioner had actually signed a waiver of the hearing in the presence of his counsel. Hence, the forty-seven day delay was not unreasonable, as it was due to actions of the petitioner.

The first of petitioner's contentions was perhaps the more important of the two. Although a case on point had already been resolved in the Court of Appeals of the Fourth Circuit, the West Virginia court had never specifically ruled on whether a circuit court has jurisdiction to revoke probation subsequent to the expiration of the probation period. The answer is no in most cases, but there are exceptions to this rule where certain circumstances exist. *Gholston v. Boles*<sup>120</sup> involved a probationer who fled the state and was not returned to West Virginia until his probation period had expired. His probation was revoked, and he sought a writ of habeas corpus from the West Virginia Supreme Court of Appeals, which denied relief without an opinion. Judge Haynesworth, writing for the Fourth Circuit, concluded that the West Virginia court recognized an exception to the general rule, and construed the violation of probation statute as authorizing commitment after the expiration of the probation period. The West Virginia court ratified Judge Haynesworth's decision, citing the following language from his opinion: "[s]uch statutes would appear perverted if so construed that a probationer could flee the jurisdiction and immunize himself from all consequences of his violation of his probation if successful in avoiding execution of an

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<sup>118</sup> 407 U.S. 514 (1972).

<sup>119</sup> 262 S.E.2d at 422.

<sup>120</sup> 305 F.2d 162 (4th Cir. 1962).

arrest warrant until the original probationary period had expired."<sup>121</sup>

*State v. Fraley*<sup>122</sup> deals with the form of the written notice requirement necessitated by *Louk v. Haynes*.<sup>123</sup> The petitioner contended that certain violations presented at the final revocation proceeding were not included in the petition for revocation of probation. Therefore, he had no notice and no opportunity to prepare a rebuttal to the charges. The court held that, since evidence about the guilty pleas to other crimes was presented at the preliminary hearing, transcribed and furnished to petitioner's counsel, who was also present at the preliminary hearing, the defendant had ample notice and opportunity to prepare a rebuttal. In dicta, the court mentions that "[i]t would be better to state all alleged violations in an original petition; however, due process notice was given."<sup>124</sup> So long as the state can show that the defendant had ample time and opportunity to prepare his case, the form of written notice seems irrelevant.

The court, acting in its supervisory capacity, discusses a tangential issue not questioned by the defendant, but raised by the facts, in a footnote.<sup>125</sup> The probation officer petitioned for defendant's arrest a mere two weeks before the end of the probationary period, yet the facts show that Fraley had violated his probation over a long period of time. The court stated that the inattention of the probation officer was inexcusable, as close supervision is an integral part of the theory of probation.

In *Sigman v. Whyte*,<sup>126</sup> the supreme court of appeals discusses at length the nature of a review of a probation revocation hearing.<sup>127</sup> The petitioner in *Sigman* contended that a petition in habeas corpus was not "an adequate substitute for an appeal,"<sup>128</sup> but the court disagreed, basing its conclusion on the fact that a defendant whose probation has been revoked is entitled to ap-

<sup>121</sup> 262 S.E.2d at 423.

<sup>122</sup> 258 S.E.2d 129 (W. Va. 1979).

<sup>123</sup> 223 S.E.2d 780 (W. Va. 1976).

<sup>124</sup> 258 S.E.2d at 131.

<sup>125</sup> *Id.* at 130 n.2.

<sup>126</sup> 268 S.E.2d 603 (W. Va. 1980).

<sup>127</sup> W. VA. CODE § 62-12-10 (1977 Replacement Vol.), the probation violation statute, sets forth no standard for revocation.

<sup>128</sup> 268 S.E.2d at 606.

pointment of counsel<sup>129</sup> and will have assistance in the preparation of his habeas corpus petition. If a *prima facie* case of illegal parole revocation is made on the habeas corpus petition, a transcript of the probation revocation proceeding will be made available to defendant and his counsel, but the state is not required to provide a transcript in every routine case.

In discussing the nature of the hearing required, the court mentions that persons who are facing a probation revocation proceeding for violation of a criminal law also face a second proceeding for commission of the crime itself. A question is raised as to whether the state must conduct a criminal proceeding and achieve a conviction before the probation may be revoked. The statute dealing with probation violation, West Virginia Code § 62-11-10,<sup>130</sup> does not speak to this issue, but "our statute on parole violation, West Virginia Code § 62-12-19<sup>131</sup> could be read to require that parole cannot be revoked for commission of a criminal offense unless defendant has been convicted of that offense."<sup>132</sup> The court, however, chose to differentiate between probation and parole in this situation, and ruled that a conviction is not required to revoke probation.<sup>133</sup>

In order that the proceedings not be abused by authorities, the court again differentiated between probation and parole in requiring that the evidence against the defendant be proven by a *clear* preponderance of the evidence in probation revocations. The standard for parole revocation requires only a showing to the "satisfaction of the board" that the parolee violated a condition of his parole.<sup>134</sup> Proof beyond a reasonable doubt is not required, the court again basing its decision on the *Morrissey v. Brewer*<sup>135</sup> statement that a parolee/probationer has been deprived of only a conditional liberty.

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<sup>129</sup> State *ex rel.* Strickland v. Melton, 152 W. Va. 500, 165 S.E.2d 90 (1968).

<sup>130</sup> (1977 Replacement Vol.).

<sup>131</sup> (1977 Replacement Vol.).

<sup>132</sup> 268 S.E.2d at 607 n.10.

<sup>133</sup> *Id.* at 607.

<sup>134</sup> W. VA. CODE § 62-12-19 (1977 Replacement Vol.).

<sup>135</sup> 408 U.S. 471 (1972).

*B. Parole Proceedings*

*Tasker v. Mohn*<sup>136</sup> deals with the nature of the due process protection for release on parole. For the first time, it is recognized in West Virginia that expectation of release on parole is a substantial liberty interest which generates due process rights. The basic due process rights which apply to every parole release interview are notice of the date and hour of the interview, access to information in defendant's record, right to appear in person and give oral and documentary evidence, record for purposes of judicial review, and written reason(s), if parole is denied.<sup>137</sup> West Virginia Code § 62-12-13(d)<sup>138</sup> requires, in addition, that "the board of parole shall have before it an authentic copy of or report on the prisoner's current criminal record" and other details which would have a bearing on the board's decision (attitude, industrial record in prison, physical and mental examinations, etc.) while West Virginia Code § 62-12-13(c)<sup>139</sup> requires the parole board to adopt rules governing the procedure for granting parole.

In *Tasker*, the West Virginia Board of Parole failed to follow not only the legislatively mandated procedure, but also its own rules with regard to evaluations of prisoners, and the petitioner appealed from a denial of parole. The question was mooted by Tasker's release on parole subsequent to oral arguments before the court, but several important points were discussed. First, in order that the notice element of due process be met, the court will require that any administrative board follow its own rules and regulations, or those relying on the rules will be misled. Second, in order to make review effective, a written record of the interview, made by recording or stenographic means, must be compiled. This ensures that the court will have material upon which to base a conclusion as to whether the board's actions were arbitrary or capricious. Third, in keeping with the rehabilitative goal of the probation/parole system, a prisoner is entitled to know why his request for parole was denied, so that he may remedy any behavioral problems before a future interview. The West Virginia court, in adopting the view that the expectation of parole is a

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<sup>136</sup> 267 S.E.2d 183 (W. Va. 1980).

<sup>137</sup> *Id.* at 191.

<sup>138</sup> (Cum. Supp. 1980).

<sup>139</sup> (Cum. Supp. 1980).

substantial liberty interest, differs from the United States Supreme Court, which distinguishes between the deprivation "of a liberty that one has, as in parole, and being denied a conditional liberty that one desires."<sup>140</sup>

In *State ex rel. J.R. v. MacQueen*,<sup>141</sup> the West Virginia supreme court held that all the constitutional protections afforded an adult in parole revocation proceedings must also be afforded juveniles. The court also recognized that the standard of proof required for revocation of parole for adults requires that the parole board be *satisfied* that a condition has been violated,<sup>142</sup> whereas a juvenile will not have his parole revoked unless there is a finding of *clear and convincing proof* of substantial violation of parole.<sup>143</sup> The doctrine of *parens patriae*, which denied some procedural protections to juveniles, has been replaced by "surplus" due process protection in this area. A juvenile now has far greater due process protection in a parole revocation hearing than does an adult.

### C. Miscellaneous Cases

*State ex rel. Faircloth v. Catlett*,<sup>144</sup> overrules in part *Conley v. Dingess*.<sup>145</sup> *Conley* held that West Virginia Code § 62-1C-1(b)<sup>146</sup> prohibited the granting of post-conviction bail for persons convicted of armed robbery, inasmuch as they were subject to life imprisonment.<sup>147</sup> Armed robbery is a crime for which there may be a determinate sentence,<sup>148</sup> and imposition of a determinate sentence of ten years or more is within the trial courts' discretion.<sup>149</sup> The problem in determining whether a defendant is eligible for bail arises over the construction of the phrase "punishable

<sup>140</sup> *Greenholty v. Nebraska Penal Inmates*, 442 U.S. 1, 9 (1979).

<sup>141</sup> 259 S.E.2d 420, 423 (W. Va. 1980).

<sup>142</sup> W. VA. CODE § 62-12-19 (1977 Replacement Vol.) (emphasis added).

<sup>143</sup> W. VA. CODE § 49-5-14 (Cum. Supp. 1980) (emphasis added).

<sup>144</sup> 267 S.E.2d 736 (W. Va. 1980).

<sup>145</sup> 250 S.E.2d 136 (W. Va. 1978).

<sup>146</sup> (1977 Replacement Vol.). This section provides in part that "[b]ail may be allowed pending appeal from a conviction for an offense not punishable by death or life imprisonment."

<sup>147</sup> W. VA. CODE § 61-2-12 (1977 Replacement Vol.).

<sup>148</sup> *State ex rel. Vascovich v. Skeen*, 138 W. Va. 417, 424, 76 S.E.2d 283 (1953), *cert. denied*, 346 U.S. 916 (1953).

<sup>149</sup> See note 146 *supra*.

by . . . life imprisonment." A majority of the supreme court felt that, since an armed robber could be punished by a term of life imprisonment or a determinate sentence for less, it would be unwise to deem armed robbery a crime "punishable by . . . life imprisonment" within the meaning of the statute so as to deprive a person sentenced to less than life imprisonment of the chance for bail pending appeal.

In a sharply worded dissent, Justice Caplan, joined by Chief Justice Neely, criticizes the majority for "legislating in a manner directly contrary to clear statutory language."<sup>150</sup> The majority, however, based its decision on three considerations: "[t]he structural differences in the statutory language setting punishment for crimes that are punishable by confinement for life, and the armed robbery statute,"<sup>151</sup> the rule of strict statutory construction of criminal statutes and the remedial purpose of the bail statute.<sup>152</sup>

In *State v. Olish*,<sup>153</sup> the court held that where the defendant wishes to withdraw a guilty plea made voluntarily and with full knowledge of his rights before sentence is imposed, he is generally allowed that right if he can show any fair and just reason. The defendant in this case had pled guilty to first degree murder after the prosecutor agreed to remain neutral on the question of mercy, but the presentence report contained statements made by the prosecutor in apparent violation of the agreement. The defendant, rather than seeking to enforce the plea bargain agreement, chose to withdraw his guilty plea.

The West Virginia court has established as a general rule that once a guilty plea is entered and sentence imposed, it will not be set aside.<sup>154</sup> Only where refusal to set aside the plea will result in manifest injustice will the court consider allowing the withdrawal to be made.<sup>155</sup> In this situation, however, the parties will be placed in their original position if the plea is withdrawn.

<sup>150</sup> 267 S.E.2d at 738.

<sup>151</sup> *Id.* at 737.

<sup>152</sup> See *State ex rel. Hutzler v. Dostert*, 236 S.E.2d 336 (W. Va. 1977), where W. VA. CODE § 62-1C-1 (1977 Replacement Vol.) was interpreted as allowing post-conviction bail.

<sup>153</sup> 266 S.E.2d 134 (W. Va. 1980).

<sup>154</sup> *State ex rel. Burton v. Whyte*, 256 S.E.2d 424 (W. Va. 1979).

<sup>155</sup> *Potter v. Mohn*, 256 S.E.2d 763 (W. Va. 1979); *State v. Stevenson*, 67 W. Va. 553, 68 S.E. 286 (1910).



Sentence has not been imposed and neither side gains an advantage. It is only equitable to allow the defendant to withdraw his plea where he detrimentally relies on the representations of the prosecutor and has been misled, whether intentionally or not. If, however, the state will suffer substantial prejudice if the guilty plea is withdrawn prior to sentence, this is a factor the court should balance in determining whether the plea should be withdrawn. The question raised by this case need never have become an issue if the plea bargain had been disclosed at the time the initial guilty plea was entered. The court would have determined its validity and made sure that its terms were followed.<sup>156</sup>

The defendant in *State v. Vance*<sup>157</sup> was convicted of breaking and entering and was subsequently sentenced under the Habitual Criminal Act.<sup>158</sup> On appeal, one ground alleged as error was that the conviction was based on testimony of accomplices and he was denied the usual cautionary instructions as to their testimony. Generally, a criminal conviction may be obtained on the uncorroborated testimony of an accomplice.<sup>159</sup> Where the testimony of the accomplice is uncorroborated, however, the defendant is entitled to a cautionary instruction to the jury, as an accomplice may well have a motive for testifying against the defendant other than the search for truth.<sup>160</sup> The problem is in determining the degree of corroboration necessary to preclude the use of the cautionary instruction. No West Virginia cases to date have analyzed this particular question, so the court adopted the Virginia rule that "[w]here . . . the testimony of an accomplice is corroborated in material facts which tend to connect the accused with the crime, sufficient to warrant the jury in crediting the truth of the accomplice's testimony, it is not error to refuse a cautionary instruction."<sup>161</sup> The West Virginia court further advised that where there is doubt, the instruction should be given.

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<sup>156</sup> See *Call v. McKenzie*, 220 S.E.2d 665 (W. Va. 1975); *State ex rel. Clancy v. Coiner*, 154 W. Va. 857, 179 S.E.2d 726 (1971).

<sup>157</sup> 262 S.E.2d 423 (W. Va. 1980).

<sup>158</sup> W. VA. CODE § 61-11-18 (1977 Replacement Vol.).

<sup>159</sup> *State v. Messinger*, 256 S.E.2d 587 (W. Va. 1979).

<sup>160</sup> *State v. Spadafore*, 220 S.E.2d 655 (W. Va. 1975).

<sup>161</sup> *Dilliard v. Commonwealth*, 216 Va. 820, 823, 224 S.E.2d 137, 140 (1976).

## VI. OTHER CASES

The issue in *State ex rel. Rowe v. Ferguson*<sup>162</sup> was whether, under West Virginia law, criminal defendants have a right to a post-indictment preliminary hearing. The West Virginia Supreme Court of Appeals held that the accused does not have a right to a preliminary hearing if he has been already indicted by a grand jury.

After finding nothing in the West Virginia Constitution that would give an independent constitutional right to a preliminary hearing,<sup>163</sup> the court turned to the defendant's argument that West Virginia Code § 62-1-8<sup>164</sup> should be construed as requiring a preliminary hearing for any offense that is to be presented to a grand jury. The pertinent part of the statute reads, "[i]f the offense is to be presented for indictment, the preliminary examination shall be conducted . . . within a reasonable time after the defendant is arrested, unless the defendant waives examination."<sup>165</sup> The court first noted that this section of the code "is part of a larger criminal procedure article" and, therefore, related sections must be read *in pari materia*.<sup>166</sup>

The court concluded that two basic principles are implied from the conditional statement, "if the offense is to be presented for indictment, the preliminary hearing shall be conducted . . . ."<sup>167</sup> First, not all offenses need be presented for indictment, and second, the right to a preliminary hearing depends upon the happening of a future event, presentation to a grand jury. If the offense *will be* presented to a grand jury, a preliminary hearing must be held because the defendant is "in custody" and no determination of probable cause has yet been made. But if the state indicts without a preliminary hearing or before one can be held, the preliminary hearing is not required, as probable cause has been determined to exist by the return of the indictment. To hold a preliminary hearing for another probable cause determination

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<sup>162</sup> 268 S.E.2d 45 (W. Va. 1980).

<sup>163</sup> *Id.* at 47. Most other state courts agree with this conclusion. See cases cited in 268 S.E.2d at 47.

<sup>164</sup> (1977 Replacement Vol.).

<sup>165</sup> *Id.*

<sup>166</sup> 268 S.E.2d at 48.

<sup>167</sup> W. VA. CODE § 62-1-8 (1977 Replacement Vol.).

would be superfluous.

Another function of the preliminary hearing has been discovery. In West Virginia, discovery is liberally accorded once a defendant has been indicted,<sup>168</sup> therefore a post-indictment preliminary hearing is an unnecessary waste of resources. Since the two primary reasons for holding a preliminary hearing are rendered moot by the return of an indictment, the West Virginia Supreme Court of Appeals held in *Rowe* that a preliminary hearing is not necessary in these circumstances.

*State ex rel. Arbogast v. Mohn*<sup>169</sup> involved the application of the West Virginia general savings statute<sup>170</sup> to the amendment of a penal law. The defendants in *Arbogast* were indicted for grand larceny at a time when that crime was defined as the taking of goods worth fifty dollars or more. However, before they were convicted and sentenced to the state penitentiary, the statute defining grand and petit larceny was amended by the legislature to include as grand larceny only the taking of goods worth two hundred dollars or more.<sup>171</sup> Subsequent to their convictions, the defendants filed habeas corpus petitions contesting the legality of their confinement in the penitentiary on the basis that the amendment changed the character of their offenses from felonies to misdemeanors.

The supreme court of appeals rejected the defendant's argument that the amendment affected the character of the offense. The defendants, therefore, retained their status as convicted felons. However, reasoning that the amendment expressed the legislature's intent that from the effective date of the amendment the taking of goods worth less than two hundred dollars should be *punished* as a misdemeanor, the court held that the amendment

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<sup>168</sup> 268 S.E.2d at 50, citing *State v. Sette*, 242 S.E.2d 464 (W. Va. 1978).

<sup>169</sup> 260 S.E.2d 820 (W. Va. 1979).

<sup>170</sup> W. VA. CODE § 2-2-8 (1979 Replacement Vol.) provides:

The repeal of a law . . . shall not affect any offense committed, or penalty or punishment incurred, before the repeal took effect . . . and that if any penalty or punishment be mitigated by the new law, such new law may, with the consent of the party affected thereby, be applied to any judgment pronounced after it has taken effect.

<sup>171</sup> W. VA. CODE § 61-3-13 (Cum. Supp. 1980). The defendants were convicted for the taking of goods worth more than \$50 but less than \$200.

did have the effect of mitigating the former statute's penalties.<sup>173</sup> Since the general savings statute provides for the application of mitigated penalties upon the election of the affected party, the court found that the defendants should have been entitled to choose under which statute they desired to be sentenced.

In addition to establishing the right of a defendant to elect the amended statute to be applied for sentencing purposes, the court also found that the requirements of due process place upon the trial court, as well as the defendant's counsel, the duty to inform the defendant of his right to election.<sup>173</sup> In so doing the court overruled *State v. McClung*<sup>174</sup> insofar as it held that there was no duty on the part of the court to inform the defendant of his right to elect. Since there was no record in the instant case of whether the defendants had been informed of their right to elect, the court remanded for further proceedings.

In *State v. Vollmer*<sup>175</sup> the issue raised was whether the state, in charging an offense arising out of an automobile accident, must proceed under the West Virginia negligent homicide statute,<sup>176</sup> or whether it may charge the defendant with involuntary manslaughter. The defendant had argued, *inter alia*, that only the negligent homicide statute should apply because the statutory crime contains different elements of proof than the crime of involuntary manslaughter. The foundation of this argument rests upon the notion that negligent homicide requires a showing of "reckless disregard of the safety of others,"<sup>177</sup> while involuntary

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<sup>173</sup> The court recognized that it could be argued that the amendment did not actually mitigate the penalties imposed by the former statute, but only redefined the offenses of petit and grand larceny, and provided alternative penalties to be applied at the discretion of the sentencing court. However, the court felt, in light of the legislature's determination that the imposition of an indeterminate sentence in the penitentiary was too harsh a penalty for the taking of goods worth less than \$200, that "the net effect of the amendment was indeed, to mitigate the penalties imposed" under the former statute. 260 S.E.2d at 824 (emphasis by the court).

<sup>174</sup> The *Arbogast* court did not reach the issue of whether the failure of the defendant's counsel to inform him of his right to elect constituted ineffective assistance of counsel. However, the court suggests that, standing alone, it probably does not.

<sup>175</sup> 116 W. Va. 591, 182 S.E. 865 (1935).

<sup>176</sup> 259 S.E.2d 836 (W. Va. 1979).

<sup>177</sup> W. VA. CODE § 17C-5-1 (Cum. Supp. 1980).

<sup>177</sup> *Id.*

manslaughter requires only a showing that the defendant was "engaged in an unlawful act or the performance of a lawful act in an unlawful manner."<sup>178</sup> Thus, according to the defendant's argument, if the state were allowed to charge him with involuntary manslaughter he could be convicted upon a showing of simple negligence despite the negligent homicide statute's requirement of a showing of reckless conduct. The court rejected this argument. Relying on *State v. Lough*,<sup>179</sup> it found that an "unlawful act" for purposes of involuntary manslaughter contemplates only acts which are *malum in se*, not acts which are merely *malum prohibitum*.<sup>180</sup> Consequently more than simple negligence or the violation of a traffic ordinance is required to sustain a charge of involuntary manslaughter. Since the standard of proof required by a charge of involuntary manslaughter is compatible with that set out in the negligent homicide statute, the state may charge the defendant with either crime.

In *State ex rel. Farley v. Wharton*,<sup>181</sup> the West Virginia Supreme Court of Appeals declared unconstitutional West Virginia Code § 61-3A-3<sup>182</sup> as it creates an unconstitutional presumption of intent, which is a material element of the crime of shoplifting.

The court has previously held, in a number of situations, that any statute which supplies an element of a crime is unconstitutional because such statutes remove from the state the burden of proving every material element of a crime beyond a reasonable doubt.<sup>183</sup> Here, each of the definitions of shoplifting contained in West Virginia Code § 61-3A-1<sup>184</sup> requires proof of an intention to convert. However, "§ 61-3A-3 makes the act of concealment *prima facie* evidence that there was an intention to convert."<sup>185</sup> If the statute is allowed to stand, the crime changes from that of

<sup>178</sup> *State v. Lough*, 143 W. Va. 838, 105 S.E.2d 538 (1958).

<sup>179</sup> *Id.*

<sup>180</sup> "An offense *malum in se* is properly defined as one which is naturally evil, as adjudged by the sense of a civilized community. An act which is *malum prohibitum* is wrong only because made so by statute." 40 AM. JUR. 2d *Homicide* § 77 (1968).

<sup>181</sup> 267 S.E.2d 754 (W. Va. 1980).

<sup>182</sup> (1977 Replacement Vol.).

<sup>183</sup> See *State v. Ball*, 264 S.E.2d 844 (W. Va. 1980); *State v. Pendry*, 227 S.E.2d 210 (W. Va. 1976).

<sup>184</sup> (1977 Replacement Vol.).

<sup>185</sup> 267 S.E.2d at 755 (emphasis in original).

concealment with the intent to convert, to simply concealment;<sup>186</sup> this the court found untenable. *Farley* is thus another link in a chain of cases which hold that any statute which supplies a material element of a crime is unconstitutional.<sup>187</sup>

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<sup>186</sup> *Id.* at 755.

<sup>187</sup> See cases cited at note 193 *supra*.

## DOMESTIC RELATIONS

### I. ALIMONY

The West Virginia Code provides for a divorce on the grounds of irreconcilable differences without requiring an allegation of fault in the complaint.<sup>1</sup> However, since "fault" has traditionally been the basis for justifying alimony, the question arose in the recent case of *Haynes v. Haynes*<sup>2</sup> whether alimony could be granted in those instances where no fault was proved.

The plaintiff (wife) in *Haynes* filed for a divorce charging adultery, mental cruelty, and irreconcilable differences. The trial court found both parties "equally entitled to the divorce because of irreconcilable differences and denied any alimony award."<sup>3</sup> In reaching its conclusion the lower court relied on the supreme court decision in *Dyer v. Tsapis*.<sup>4</sup>

In *Dyer* the court held that in divorce cases where alimony had not been fixed by agreement, the courts must take a number of factors into consideration when making an alimony award so "as to strike a balance among all the competing equities."<sup>5</sup> The divorce in *Dyer* was based on a voluntary separation under a West Virginia Code section which seems to require a finding of fault before an award of alimony may be made.<sup>6</sup> Given this statu-

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<sup>1</sup> W. VA. CODE § 48-2-4(a)(10) (Cum. Supp. 1980) provides:

If one party to a marriage shall file a verified complaint, for divorce, against the other, alleging that irreconcilable differences have arisen between the parties, . . . and if the defendant shall file a verified answer to the complaint and admit or aver that irreconcilable differences exist between the parties the court may grant a divorce. . . . The court may make such order for alimony . . . as may be just and equitable. . . .

<sup>2</sup> 264 S.E.2d 474 (W. Va. 1980).

<sup>3</sup> *Id.* at 475.

<sup>4</sup> 249 S.E.2d 509 (W. Va. 1978).

<sup>5</sup> *Id.* at 513.

<sup>6</sup> W. VA. CODE § 48-2-4(a)(7) (Cum. Supp. 1980) provides that a divorce may be ordered:

Where the parties have lived separate and apart in separate places of abode without any cohabitation and without interruption for one year, whether such separation was the voluntary act of one of the parties or

tory mandate the court obviously considered fault a major factor to be considered in the alimony decision; at least, in the voluntary separation context.

The trial court read the *Dyer* decision broadly and assumed that a finding of fault was a prerequisite to making a "just and equitable" award of alimony as required by the statute allowing divorces based on irreconcilable differences.

On appeal, the appellant asserted that she had the right to alimony without a showing of fault. The supreme court agreed with this interpretation of the statute reasoning that fault was only one of many factors which determine what is "just and equitable." The court noted that a divorce based on irreconcilable differences was "strictly consensual." A divorce is not granted on irreconcilable difference grounds unless in response to a complaint alleging those differences the other "party files an answer admitting those differences."<sup>8</sup>

The court believed that this procedure, requiring an "admission" or "consent," indicated that "the Legislature intended to eliminate fault as an absolute condition precedent to an alimony award" in divorces based on irreconcilable differences.<sup>9</sup>

The court in distinguishing its holding in *Dyer* stated that the crucial difference between the voluntary separation statute involved in *Dyer* and the irreconcilable differences statute involved in *Haynes* was that the latter statute was consensual.<sup>10</sup> When the divorce is consensual "alimony may be awarded without the same finding of inequitable conduct which would be required in a non-consensual context."<sup>11</sup>

The court has stated that in making a determination of alimony, whatever the ground for the divorce, the trial judge

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by the mutual consent of the parties; . . . If alimony is sought, . . . the court may inquire into the question of who is the party at fault and may award such alimony according to the right of the matter . . .

The court in *Dyer* said "fault" when used in the context of the above section meant "inequitable conduct." 249 S.E.2d at 512.

<sup>7</sup> 264 S.E.2d at 476.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*



"should look to all the possible factors and tailor his decree in such a way as to strike a balance among all the competing equities."<sup>12</sup> In view of the decision in *Haynes* the element of fault will have to be weighted differently in this balance depending on whether the divorce is characterized as consensual or non-consensual.

## II. PATERNITY SUITS

The West Virginia Supreme Court of Appeals recently confronted two cases dealing with the due process rights of defendants in paternity suits. In *State ex rel. Graves v. Daugherty*,<sup>13</sup> the court was concerned with the indigent defendant's right to court-appointed counsel; while in *State ex rel. Gue v. Dunbar*,<sup>14</sup> the court dealt with the indigent's right to state-paid blood tests.

In *Daugherty*, the trial court refused to appoint counsel on the ground that "a paternity suit is in the nature of a civil proceeding,"<sup>15</sup> and, therefore, due process considerations do not apply.

The mere classification of an action as "civil," however, does not end the due process inquiry under the supreme court's recent interpretations of the West Virginia Constitution. The court has recognized that due process requires the appointment of counsel by the court "in criminal *and* civil actions which may constrain one's liberty or involve important personal rights."<sup>16</sup> For instance, the court has required the appointment of counsel in civil mental health commitment hearings,<sup>17</sup> civil and criminal contempt proceedings,<sup>18</sup> hearings regarding violation of municipal ordinances,<sup>19</sup> child neglect proceedings,<sup>20</sup> and juvenile proceedings.<sup>21</sup>

The court in its review of the lower court's decision in

<sup>12</sup> *Id.* (quoting *Dyer v. Tsapis*, 249 S.E.2d at 513).

<sup>13</sup> 266 S.E.2d 142 (W. Va. 1980).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 144 (emphasis added).

<sup>17</sup> *State ex rel. Hawks v. Lazaro*, 157 W.Va. 417, 202 S.E.2d 109 (1974).

<sup>18</sup> *Eastern Associated Coal Corp. v. Doe*, 220 S.E.2d 672 (W. Va. 1975).

<sup>19</sup> *Bullett v. Staggs*, 250 S.E.2d 38 (W. Va. 1978).

<sup>20</sup> *State ex rel. Lemaster v. Oakley*, 157 W. Va. 590, 203 S.E.2d 140 (1974).

<sup>21</sup> *Wilson v. Bambrick*, 156 W. Va. 703, 195 S.E.2d 721 (1973).

*Daugherty* quickly rejected the lower court's simplistic resolution of the case and focused its attention on the "characteristics and ramifications" of the paternity proceeding.<sup>22</sup> The court noted that a paternity defendant is arrested, brought before a magistrate, required to post bond, and prosecuted by the state. More importantly, however, the fixing of paternity upon the defendant can affect "his liberty, his estate, and his earnings."<sup>23</sup>

The court concluded that the indigent defendant in a paternity suit was entitled to due process protection in the form of appointed counsel because of the potential significant impact of a paternity determination on his liberty and property. The court's decision reinforces its position that "the characteristics and ramifications of a proceeding, rather than its label spawn due process requirements."<sup>24</sup>

In the other paternity case, *State ex rel. Gue v. Dunbar*, the trial court refused an indigent defendant's motion requesting blood grouping tests to be performed and paid for by the state. The West Virginia Code provides that where a defendant is being charged with fathering an illegitimate child, he is entitled to require blood tests to be made of the mother, her child, and himself for the sole purpose of proving he is not the father of the child. Although the trial court would have permitted the blood tests, it held that the defendant would have to pay for them.

The defendant in *Gue* appealed this decision claiming that his rights under the due process and equal protection clauses of the United States and West Virginia constitutions had been violated. The West Virginia Court agreed holding that blood grouping tests in this case were expenses that should be borne by the State. The court stated that:

Because of the criminal elements attached to paternity proceedings, because blood tests are an important part of the defense against allegations of paternity, because the language of our statute is mandatory, and because the defendant's ability to pay for the blood test bears no rational relationship to his guilt or innocence, a defendant is entitled to administration of

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<sup>22</sup> 266 S.E.2d at 144.

<sup>23</sup> *Id.* at 145, quoting *State ex rel. Wright v. Bennett*, 90 W.Va. 477, 480, 111 S.E. 146, 147 (1922).

<sup>24</sup> 266 S.E.2d at 144.

the tests even though he is unable to pay the required costs.<sup>25</sup>

The cases of *Daugherty* and *Gue* give the indigent defendant the right to court-appointed counsel and free blood tests. Failure of the state to provide either will constitute reversible error.

### III. CHILD CUSTODY

The West Virginia Code provides for a change in custody of children after a court decree awarding a divorce, if the person seeking custody change files a petition with the court for a hearing.<sup>26</sup> In practice, this is usually done by writ of habeas corpus. While the party whose rights will be affected must be given reasonable notice of the hearing, personal service of process upon that party is not required. It has been stated that such notice could be made "in any manner in which service of process in a civil suit or action may be had."<sup>27</sup> For instance, in *Harloe v. Harloe*,<sup>28</sup> the court referred to the notice required in such a proceeding and stated, "notice need not necessarily be personal service but it must be notice of some character provided by law, either by delivery of a copy to a member of his family over sixteen years of age, or posting, or by publication."<sup>29</sup> In *Acord v. Acord*,<sup>30</sup> the West Virginia court held that mailing a notice to a party's attorney of record was insufficient notice of the proceeding, thus rendering the order of the court void.

### IV. CONTEMPT

In domestic relations litigation, alimony,<sup>31</sup> counsel fees,<sup>32</sup> suit money,<sup>33</sup> support,<sup>34</sup> and maintenance<sup>35</sup> may be enforced by civil contempt proceedings. As a result, the defendant held in con-

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<sup>25</sup> 266 S.E.2d at 146.

<sup>26</sup> W. VA. CODE § 48-2-15 (1976 Replacement Vol.).

<sup>27</sup> *Harloe v. Harloe*, 129 W. Va. 1, 38 S.E.2d 362 (1946).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 5, 38 S.E.2d at 364.

<sup>30</sup> 264 S.E.2d 848 (W. Va. 1980).

<sup>31</sup> *Ex parte Beavers*, 80 W. Va. 34, 91 S.E. 1076 (1917).

<sup>32</sup> *Miller v. Baer*, 114 W. Va. 566, 172 S.E. 612 (1934).

<sup>33</sup> *Id.*

<sup>34</sup> *Bailey v. Bailey*, 127 W. Va. 826, 35 S.E.2d 81 (1945).

<sup>35</sup> *Id.*

tempt faces the possibility of imprisonment.<sup>36</sup> Initial considerations underlying imprisonment for civil contempt in domestic relation matters include: "What conduct may result in this harsh remedy?"; and, "What procedures must be utilized to protect the rights of the accused before imprisonment is ordered?" Two recent West Virginia cases provide new guidance for trial courts in these matters.

In *State ex rel. Canada v. Hatfield*,<sup>37</sup> the West Virginia Supreme Court of Appeals limited the remedy of imprisonment for failure to pay child support to those situations where the defendant is contumacious. The trial court in *Canada* ordered the defendant to be imprisoned "until he has purged himself of contempt or until further order of the court."<sup>38</sup> The defendant was found to be over \$3,000 in arrears in child support payments. The nonpayment of the child support, however, was a result of the defendant's unemployment. The record contained no evidence that the defendant had acted in a contumacious manner. The appellate court held that "[i]n the absence of proof of a contumacious attitude, the trial court abused its discretion by finding the relator in contempt and ordering his imprisonment."<sup>39</sup> This application of the contumacious standard of contempt for failure to pay child support extends *State ex rel. Varner v. Janco*.<sup>40</sup> In that case, the court required evidence of contumacious behavior before one could be imprisoned for arrearages in alimony payments. Therefore, before a defendant can be jailed for failing to pay child support or alimony, a finding of contumacious behavior must be evidenced and reflected in the record. The mere lack of payment is insufficient to justify confinement of the defendant.

In *Hendershot v. Hendershot*,<sup>41</sup> the court recognized the right to a jury trial in a contempt proceeding where a jail sentence is imposed and the defendant is given no opportunity for

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<sup>36</sup> *Smith v. Smith*, 81 W. Va. 761, 95 S.E. 199 (1918).

<sup>37</sup> 258 S.E.2d 440 (W. Va. 1979).

<sup>38</sup> *Id.* at 441.

<sup>39</sup> *Id.* See *May v. Dupont*, 43 Del. Ch. 334, 229 A.2d 784 (1967) (the court distinguishes between the usage of contumacious in the legal sense and in a dictionary sense. The former means wilful disobedience to a judicial order; the latter means stubbornly perverse or rebellious, contrary, factious, or intractable).

<sup>40</sup> 156 W.Va. 139, 191 S.E.2d 504 (1972).

<sup>41</sup> 263 S.E.2d 90 (1980).

immediate release by purging himself. In *Hendershot*, the appellant was held in contempt and imprisoned for conspiring with his son to remove his grandson from the state, thus violating a divorce court order requiring the son to relinquish custody of the child. The trial court refused the appellant's request for a jury trial.

The majority of the court in *Hendershot*<sup>42</sup> ruled that contempt will be deemed criminal when the court order includes imprisonment and there is no opportunity for the contemnor to gain immediate release by doing an act within his power. The *Hendershot* rule does not apply in situations where the sentencing order allows for immediate release if the defendant performs an act reasonably within his power, nor does it prevent the court from summarily expelling a disruptive person from the courtroom.<sup>43</sup> The criminal designation is heavily dependent on the nature of the punishment inflicted.<sup>44</sup> These latter situations do not carry sanctions sufficient to cross the rather indistinct line between civil and criminal contempt.

The majority in *Hendershot* based the right to a jury trial in a contempt proceeding deemed criminal on article III, section 14 of the West Virginia Constitution. The court felt that since the formation of the state, the framers of the constitution, the legislature and the court itself have been unanimous in the belief that the right to a jury trial is accorded in criminal actions where the penalty imposed involves any period of incarceration. This is a greater right than that afforded under the United States Constitution.<sup>45</sup>

Thomas H. Fluharty

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<sup>42</sup> Chief Justice Neely filed a dissent.

<sup>43</sup> 263 S.E.2d at 97.

<sup>44</sup> *Id.* at 93.

<sup>45</sup> *Bloom v. Illinois*, 391 U.S. 194 (1968).

## ELECTIONS

*West Virginia Libertarian Party v. Manchin*<sup>1</sup> is a challenge by third political parties<sup>2</sup> and an independent candidate of the constitutionality of several West Virginia election statutes.<sup>3</sup>

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<sup>1</sup> 270 S.E.2d 634 (W. Va. 1980), *appeal dismissed*, 49 U.S.L.W. 3213 (Oct. 7, 1980). The petitioners in this case include: The West Virginia Libertarian Party; 1980 West Virginia Socialist Workers Campaign Committees; Tom Moriarity, Socialist Workers candidate for governor, and John B. Anderson, independent candidate for president, as intervenor.

<sup>2</sup> Third parties include any party other than Democratic and Republican.

<sup>3</sup> The text of W. VA. CODE, § 3-5-8(a) (1979 Replacement Vol.) states: A candidate for president of the United States, for vice-president of the United States, for United States senator, for member of the United States house of representatives, for governor and for all other state elective offices shall pay a fee equivalent to one percent of the annual salary of the office for which the candidate announces. . . . (emphasis added).

The material portion of W. VA. CODE § 3-5-23(b) (1979 Replacement Vol.) provides:

The person or persons soliciting or canvassing signatures of duly qualified voters on such certificate or certificates, shall be residents and qualified, registered voters, of the magisterial district of the county in which such solicitation or canvassing is made, and may solicit or canvass duly registered voters resident within their own respective magisterial district . . . .

The relevant part of W. VA. CODE § 3-5-23(c) (1979 Replacement Vol.) states: The certificate shall be personally signed by duly registered voters . . . who must be residents within the magisterial district of the county wherein such canvass or solicitation is made by the person or persons duly authorized. . . . No person signing such certificate shall vote at any primary election to be held to nominate candidates for office to be voted for at the election to be held next after the date of signing such certificate. . . .

W. VA. CODE § 3-5-24 (1979 Replacement Vol.) states:

All certificates nominating candidates for office under the preceding section [§ 3-5-23], including a candidate for the office of presidential elector, shall be filed, in the case of a candidate to be voted for by the voters of the entire State or by any subdivision thereof other than a single county, with the secretary of state, and in the case of all candidates for county and magisterial district offices, including all offices to be filled by the voters of a single county, with the clerk of the circuit court of the county, not later than the day preceding the date on which

Petitioners brought an original mandamus proceeding because of the need for expedition posed by deadlines for filing fees and submitting third party signature petitions before the June 3, 1980 primary election. The court issued its order on May 22, 1980 and the full opinion was filed on September 16, 1980.

Petitioners contend that West Virginia Code § 3-5-8(a),<sup>4</sup> which requires filing fees, is in violation of the equal protection clauses of the state and federal Constitutions<sup>5</sup> as it denies ballot access to impecunious candidates. Secondly, they assert West Virginia Code § 3-5-23<sup>6</sup> denies an independent candidate the fundamental right of access to the ballot.<sup>7</sup> The third allegation relates to the requirement that a person soliciting signatures for nominating petitions must reside in the same magisterial district as the persons he solicits. The remaining challenges relate to the requirement that a person soliciting signatures have a credentials certificate; the disqualification of persons signing a nominating petition from voting in the primary election, and the requirement that nominating petitions be submitted the day before the primary election. Petitioners contend these restrictions, either separately or in combined effect, are an undue burden on ballot access.

West Virginia Code requires a candidate to submit a filing fee of one percent of the annual salary of the office for which he wishes to run.<sup>8</sup> This fee must be paid prior to obtaining petition signatures necessary for nomination of third party candidates. Two United States Supreme Court cases, *Lubin v. Panish*<sup>9</sup> and *Bullock v. Carter*,<sup>10</sup> have addressed this issue and both concluded

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the primary election is held. After such date no such certificate shall be received by such officers.

<sup>4</sup> (1979 Replacement Vol.). See note 10 *infra*.

<sup>5</sup> U.S. CONST. amend. XIV, § 1; W. VA. CONST. art. III, § 17.

<sup>6</sup> (1979 Replacement Vol.). See note 10 *infra*.

<sup>7</sup> The West Virginia Supreme Court of Appeals has recognized that the right to run for office is a fundamental right. *State ex. rel. Bromelow v. Daniel*, 258 S.E.2d 119 (W. Va. 1979); *Marra v. Zink*, 256 S.E.2d 581 (W. Va. 1979); *State ex. rel. Piccirillo v. City of Follansbee*, 233 S.E.2d 419 (W. Va. 1977); *State ex. rel. Maloney v. McCartney*, 223 S.E.2d 607 (W. Va. 1976); *Brewer v. Wilson*, 151 W. Va. 113, 150 S.E.2d 592 (1966).

<sup>8</sup> W. VA. CODE § 3-5-8 (1979 Replacement Vol.).

<sup>9</sup> 415 U.S. 709 (1974).

<sup>10</sup> 405 U.S. 134 (1972).

that "a state could not condition ballot access solely upon the payment of a filing fee."<sup>11</sup> Those decisions make it clear that some alternative to filing fees such as voter signature petitions must be available to impecunious candidates. The West Virginia court declared the statutory filing fees unconstitutional as to such candidates.<sup>12</sup>

The second assignment of error involves intervenor, John B. Anderson, and his assertion that West Virginia Code § 3-5-23,<sup>13</sup> which precludes an independent candidate from obtaining petition signatures so he may be placed on the ballot, is unconstitutional. On this point the court relies on *Storer v. Brown*<sup>14</sup> in which the United States Supreme Court announced "[W]e perceive no sufficient state interest in conditioning ballot position for an independent candidate on his forming a new political party as long as the state is free to assure itself that the candidate is a serious contender, truly independent, and with a satisfactory level of community support."<sup>15</sup> The West Virginia court therefore holds that § 3-5-23 violated the United States and West Virginia Constitutions' equal protection clauses by failing to provide the same ballot access to independent candidates as it does to political party candidates.

The third issue on appeal tests the constitutionality of the restriction in West Virginia Code § 3-5-23(b) and (c)<sup>16</sup> requiring that a person soliciting signatures for a candidate only solicit signatures from persons residing within the magisterial district in which he or she lives. The West Virginia court relies on *Moore v. Ogilvie*<sup>17</sup> to invalidate the magisterial district restriction on voter signature canvassing. In finding an equal protection violation, the West Virginia court stated that (1) the restriction discriminates

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<sup>11</sup> 270 S.E.2d at 639.

<sup>12</sup> *Id.*

<sup>13</sup> (1979 Replacement Vol.).

<sup>14</sup> 415 U.S. 724 (1974).

<sup>15</sup> *Id.* at 746. The Court, in *Storer*, upheld a California statute which disqualifies a person from running as an independent candidate if he or she has been a member of a political party within 12 months prior to the primary election in which he or she seeks to run. The Court also suggests at page 740 that gathering 13,542 signatures per day for 24 days, which is five percent of the voter turnout at the last election, is not an undue burden.

<sup>16</sup> (1979 Replacement Vol.).

<sup>17</sup> 394 U.S. 814 (1969).



against candidates who represent geographically concentrated constituents, (2) inhibits the geographic mobility of canvassers, (3) hampers the candidate by a fragmented signature drive and increased costs, since he is compelled to recruit solicitors for each magisterial district, and (4) causes invalid signatures on the petition because neither the voter nor the solicitor may know the magisterial district boundary lines.<sup>18</sup>

The court concludes that the magisterial district restriction cannot be justified by a compelling state interest under the equal protection clauses of the state and federal Constitutions.<sup>19</sup> The credentials requirement forces potential canvassers of signature petitions to be certified by a clerk of the county court pursuant to West Virginia Code § 3-5-23(b).<sup>20</sup> The court upholds this requirement in stating "the credentials requirement . . . serves a substantial state interest in assuring the integrity of the signature solicitation process."<sup>21</sup> The court concludes that the requirement imposes no unconstitutional burden on independent or third-party candidates.

This conclusion appears to be contrary to the magisterial district section in that the state need only show a substantial state interest to justify the restriction while the former section required a showing of a compelling state interest. It is not apparent from the discussion in the case why the credentials requirement deserves a different test from the magisterial district residence restriction.

The fifth and sixth issues addressed by the court are the prohibition of persons signing petitions from voting in the primary election as mandated by West Virginia Code § 3-5-23(c)<sup>22</sup> and the requirement that the candidate file signature petitions by the day preceding the primary election set forth in West Virginia Code § 3-5-24.<sup>23</sup> The court suggests that the equal protection test in this section is "whether the state has imposed a significantly higher burden on the independent or third-party candidate than

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<sup>18</sup> 270 S.E.2d at 640-42.

<sup>19</sup> *Id.* at 642.

<sup>20</sup> (1979 Replacement Vol.).

<sup>21</sup> 270 S.E.2d at 643.

<sup>22</sup> (1979 Replacement Vol.).

<sup>23</sup> (1979 Replacement Vol.).

it has imposed on major-party candidates.”<sup>24</sup>

The court once again relies heavily on United States Supreme Court cases<sup>25</sup> and decides that sections 3-5-24 and 3-5-23(c) do not impose an unreasonable burden on third-party and independent candidates in gaining access to the ballot for the general election. The court found section 3-5-24 to be reasonable in light of the filing deadline for regular party candidates and the length of time a third-party or independent candidate has to procure signature petitions.<sup>26</sup> The court also held section 3-5-23(c) reasonable because it merely prevents a person from participating twice in the primary election process.<sup>27</sup>

*Libertarian Party v. Manchin* makes significant progress in the area of ballot access for third-party and independent candidates.<sup>28</sup> The West Virginia Supreme Court of Appeals followed the United States Supreme Court cases very closely in making its interpretation of the West Virginia Equal Protection Clause. In some respects, *Libertarian Party* appears to have departed from the equal protection, compelling state interest test formerly used in West Virginia “right to run for office” cases. The decisions of *Libertarian Party v. Manchin*, *Marra v. Zink* and *State ex. rel. Piccirillo v. City of Follansbee* in this area give the impression that different tests will be applied to restrictions on a “regular party candidate” and to limits on a third-party or independent candidate.

Mark D. Clark

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<sup>24</sup> 270 S.E.2d at 644. The West Virginia court relies on *Williams v. Rhodes*, 393 U.S. 23 (1968) as support for this “significantly higher burden” test.

<sup>25</sup> *American Party of Texas v. White*, 415 U.S. 767 (1974); *Storer v. Brown*, 415 U.S. 724 (1974); *Rosario v. Rockefeller*, 410 U.S. 152 (1973); *Jenness v. Fortson*, 403 U.S. 431 (1971).

<sup>26</sup> 270 S.E.2d at 646.

<sup>27</sup> *Id.* at 647.

<sup>28</sup> See generally Elder, *Access to the Ballot by Political Candidates*, 83 DICK. L. REV. 387 (1979); Note, *Nominating Petition Requirements for Third-Party and Independent Candidate Ballot Access*, 11 SUFFOLK U. L. REV. 974 (1977); *Developments in the Law - Elections*, 88 HARV. L. REV. 1111 (1975); Kester, *Constitutional Restrictions on Political Parties*, 60 VA. L. REV. 735 (1974); Note, *The Constitutionality of Qualifying Fees for Political Candidates*, 120 U. PA. L. REV. 109 (1971).

## EVIDENCE

The West Virginia Supreme Court of Appeals in *Blamble v. Harsh*<sup>1</sup> held that the "best evidence" rule should not be used to preclude a jury's resolution of conflicting documentary evidence.

According to the best evidence rule the best evidence available should be produced when proving a matter in issue. Only in situations where primary evidence cannot be obtained should secondary evidence be admissible.<sup>2</sup>

In *Blamble*, a landowner, as plaintiff, sought a declaratory judgement determining the rights of three parties in a seven-tenths-mile long section of road. The landowner claimed the section to be a private rather than a public road. A West Virginia Department of Highways engineer testified that the road did not appear on the 1934 official highway map, and it was his district's position that the road was private.<sup>3</sup>

A witness who had been personally involved in the process of transferring county roads to the State in 1933 testified for the defendants, adjacent landowners. The witness produced a "scroll" obtained from the state department of highways upon which the county roads were schematically represented. He identified a line on the scroll as the disputed road and concluded from the scroll that the road had been a county road which should have been transferred to the state. The road's absence from the 1934 official highway map was attributed to a draftsman's error by this witness.<sup>4</sup>

The defendants argued that the scrolls constituted the "best evidence" to identify the road as a public one. The trial court, however, held that the best evidence rule was not applicable to the factual situation in this case, since it ordinarily applies to require the production of a written document and to forbid the

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<sup>1</sup> 260 S.E.2d 273 (W. Va. 1979).

<sup>2</sup> F. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS, § 67, at 436 (1979); 7 MICHIE'S JURISPRUDENCE, *Evidence* § 116 (1976).

<sup>3</sup> 260 S.E.2d, at 274-75.

<sup>4</sup> *Id.* at 275.

consideration of parol evidence. Therefore, the jury was permitted to weigh the conflicting documentary evidence and to resolve the issue.<sup>5</sup>

The supreme court affirmed the trial court's decision in holding the best evidence rule inapplicable.<sup>6</sup> This affirmation demonstrates the court's reluctance to allow the best evidence rule to be loosely applied to conflicting documentary evidence. The court took the position that the rule will ordinarily only apply to preclude oral testimony where documentary evidence exists and to preclude the use of copies when the original document is available.<sup>7</sup> Thus, the best evidence rule only excludes evidence which shows in itself that there is a more superior source of evidence available.<sup>8</sup> When there are two conflicting documents and the court cannot ascertain which is the original, a jury should resolve the issue.<sup>9</sup>

*Louis F. Williams, Jr.*

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, see, e.g., *Marson Coal Co., Inc. v. Ins. Co. of State of Pennsylvania*, 210 S.E.2d 747 (W.Va. 1974); *Montgomery v. Fay*, 139 W. Va. 273, 80 S.E.2d 103 (1954); *State v. Fowery*, 137 W. Va. 883, 74 S.E.2d 772 (1953); F. CLECKLEY, *HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS*, § 67, at 436 (1979). Professor Cleckley stated the following about the "best evidence" rule in his Handbook:

Where proof is to be made of some fact which is recorded in writing, West Virginia is committed to the best evidence rule, which requires the production of the written document and which forbids the consideration of parol evidence, unless the failure to produce the document itself is properly accounted for.

<sup>8</sup> S. GARD, *JONES ON EVIDENCE CIVIL AND CRIMINAL* § 7:1, at 87 (6th ed. 1972).

<sup>9</sup> 260 S.E.2d at 275; *Long v. City of Weirton*, 214 S.E.2d 832 (W.Va. 1975); *Morgan v. Price*, 151 W.Va. 158, 150 S.E.2d 897 (1966).

## PROCEDURE

### I. AMENDMENTS TO THE PLEADING

The case of *Roberts v. Wagner Chevrolet-Olds, Inc.*<sup>1</sup> involved a certified question to the West Virginia Supreme Court of Appeals dealing with whether an amendment to the pleadings stating a new theory of law, but which arose from the same set of facts as involved in the original complaint, would relate back to the original for the purposes of the statute of limitations.

The case stemmed from a dispute arising after the defendant, Wagner, had repaired the plaintiffs' automobile. When the plaintiffs went to get their car they were informed that the exact costs had not been computed as of that time. To save time they were asked to sign a blank note which would be filled in when actual costs were computed. They agreed but were upset when they realized the repair cost was substantially more than the original estimate. They expressed their displeasure to the Old National Bank, which had taken possession of the note by assignment, but later attempted to pay their indebtedness. The bank refused their payment and subsequently seized the plaintiffs' car.

The plaintiffs then filed suit, alleging the unconscionability of the foreclosed note and, therefore, the unlawful conversion of their property. More than a year after the filing of the original complaint the plaintiffs amended their pleading to assert a new theory of law based on the Truth in Lending Act.<sup>2</sup> Built into this Act is a one year limitation for bringing the action from the date of the violation.<sup>3</sup> Obviously, then, if the amendment did not relate back, the plaintiffs could not state a cause of action under the Act. The trial court certified the issue to the supreme court for adjudication.

The court held that the amendment did relate back and was not barred by the one year limitation. In doing so, the court effectively adopts the federal "same transaction" analysis of when

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<sup>1</sup> 258 S.E.2d 901 (W. Va. 1979).

<sup>2</sup> 15 U.S.C. § 1601 (1968).

<sup>3</sup> 15 U.S.C. § 1640(e) (1968).

amendments relate back. This test generally provides that an amendment (even if it states a new theory of law) arising out of the same transaction or occurrence giving rise to the original complaint will relate back to the original complaint.<sup>4</sup> This is opposed to the "cause of action" test adopted at common law which permitted an amendment to relate back as long as it did not alter the cause of action asserted in the original complaint. Under this analysis if the amended pleading altered the theory of the case, for example, from tort to contract, then the amendment did not relate back even if the facts alleged in the two complaints were identical.<sup>5</sup> Thus, at common law a new legitimate claim could be defeated by a statute of limitations, though there would have been no prejudice to the defendant if the claim had been permitted. This is unduly harsh and was a prime consideration in the promulgation of Rule 15(c).

Given that West Virginia's Rule 15(c) is identical to Rule 15(c) of the Federal Rules of Civil Procedure, with the exception of a clause relating to service of process on the Attorney General in the federal rule, there would be strong reason for the court to accept the interpretation expressed in the overwhelming number of federal decisions addressing the subject.<sup>6</sup> In addition, the West Virginia court in the past has recognized the precedential value of federal decisions interpreting Rule 15(c).<sup>7</sup> Two noted authors interpreting the West Virginia rule give essentially the same interpretation as the court in *Roberts*.<sup>8</sup>

Finally, the court's holding is not inconsistent with the purpose behind statutes of limitation in general. Basically, the rationale for having a statute of limitations is to avoid the introduction of stale evidence. This protects the defendant who cannot adequately prepare a defense because evidence favorable to him

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<sup>4</sup> 3 MOORE'S FEDERAL PRACTICE § 15.15[3]; 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1496 (1971) [hereinafter cited as WRIGHT & MILLER].

<sup>5</sup> WRIGHT & MILLER § 1497 at 499, citing Shipman, COMMON LAW PLEADING § 163, at 296 (3d ed. 1923).

<sup>6</sup> See, e.g., Tiller v. Atlantic Coast Line R.R., 323 U.S. 574 (1945); United States v. Johnson, 288 F.2d 40 (5th Cir. 1961); Nola Elec. Co. v. Reilly, 93 F. Supp. 164 (S.D.N.Y. 1948).

<sup>7</sup> Plum v. Mitter, 204 S.E.2d 8 (W. Va. 1974).

<sup>8</sup> M. LUGAR & L. SILVERSTEIN, WEST VIRGINIA RULES OF CIVIL PROCEDURE 142 (1960).

has been lost or destroyed during the time elapsed since the cause of action accrued.<sup>9</sup> This concern is effectively upheld by the court by predicating the same transaction test with the limitations that the "[r]elation back should not occur where (1) allowance of relation back would work injustice on any party or (2) the opposing party had no notice of the new cause, and, by allowing relation back, he would have no opportunity to prepare a defense to it."<sup>10</sup>

These limitations are not required by the express wording of the rule, yet as the court points out it is not inconsistent with interpretations placed on Rule 15(c) by the federal decisions.<sup>11</sup>

## II. ATTORNEY WITHDRAWAL

In *Cardot v. Luff*<sup>12</sup> the West Virginia Supreme Court of Appeals establishes the procedural guidelines for when an attorney may withdraw from a case. The case was before the court via a writ of prohibition filed by the petitioners when the lower court denied their motion to withdraw.

The petitioners were originally retained to represent certain defendants in two civil suits pending in the circuit court. Problems arose when the parties represented refused to advance the petitioners money for certain expenses which had accrued as a result of the pending litigation and failed to respond to phone calls and letters from the petitioners. At the pre-trial conference which the petitioners failed to attend because of their attempted withdrawal, their motion to withdraw was overruled. The petitioners then filed the writ of prohibition.<sup>13</sup>

While the case before the court was not one of first impression,<sup>14</sup> it did involve an issue which had not received any extensive treatment; the case therefore permitted elaboration on an issue which will probably be of import to every attorney at some point in his practice.

The court provides three basic criteria for when an attorney

<sup>9</sup> See 51 AM. JUR. 2d *Limitations of Actions* § 17 (1970).

<sup>10</sup> 258 S.E.2d at 903-04.

<sup>11</sup> See, e.g., *Tiller v. Atlantic Coast Line R.R. Co.*, 323 U.S. 574 (1945); *Zagurski v. American Tobacco Co.*, 44 F.R.D. 440 (D.C. Conn. 1967).

<sup>12</sup> 262 S.E.2d 889 (W. Va. 1980).

<sup>13</sup> 262 S.E.2d at 890-91.

<sup>14</sup> See *Matheny v. Farley*, 66 W. Va. 680, 66 S.E. 1060 (1910).

may withdraw. First and probably foremost, the attorney in a civil suit<sup>15</sup> is justified in withdrawing only upon demonstration of good cause.<sup>16</sup> What constitutes good cause is not addressed by the court in *Cardot*; however, it is clear that failure by the client to provide necessary fees is sufficient good cause to justify withdrawal.<sup>17</sup>

Demonstration of good cause does not provide the attorney with an absolute right to withdraw. In addition, the attorney must also provide his client with reasonable notice of his intention to withdraw.<sup>18</sup> Finally, the court requires the attorney seeking withdrawal in a pending suit to obtain the permission of the particular court involved.<sup>19</sup>

Applying these principles to the present case, the court found that even though approval by a court for withdrawal should rarely be withheld,<sup>20</sup> in this instance the trial court acted properly in denying the petitioners' motion. While recognizing that the petitioners had ample cause for terminating the relationship, the court held that the petitioners did not adequately provide their clients with reasonable notice. The petitioners in their correspondences alluded to their intentions to withdraw, but they never expressed a definite statement of intention to do so, nor the exact time when the appropriate motion would be made before the circuit court.<sup>21</sup>

One thing in the *Cardot* decision that seems difficult to understand is the court's rather strict application of the notice requirement. In the present case the petitioners' clients probably did have knowledge that the petitioners wished to withdraw. Any

<sup>15</sup> Criminal cases are treated somewhat differently. The rule is generally more restrictive. See, e.g., *Watson v. Black*, 239 S.E.2d 664 (W. Va. 1977); *Young v. Young*, 212 S.E.2d 310 (W. Va. 1975).

<sup>16</sup> *Stark County v. Mischel*, 42 N.D. 332, 173 N.W. 817, 6 A.L.R. 174 (1919); 2A *MICHIE'S JURISPRUDENCE Attorney and Client* § 16 (1969).

<sup>17</sup> 262 S.E.2d at 893. See *Matheny v. Farley*, 66 W. Va. 680, 684, 66 S.E. 1060, 1061 (1910).

<sup>18</sup> 262 S.E.2d at 893.

<sup>19</sup> *Id.* at 892. See *Fisher v. State*, 248 So. 2d 479 (Fla. 1971); *Fairchild v. General Motors Acceptance Corp.*, 254 Miss. 261, 179 So. 2d 185 (1965); See also *Code of Professional Responsibility*, W. VA. CODE, Appendix DR 2-110(A)(1) (1978 Replacement Vol.).

<sup>20</sup> 262 S.E.2d at 893. See *Fisher v. State*, 248 So. 2d 479 (Fla. 1971).

<sup>21</sup> 262 S.E.2d at 894.



prejudice suffered by the parties could have been cured by the mere granting of a continuance. In the last sentence of the opinion the court states, "Today's finding does not preclude relators on further proper notice from renewing the motion to withdraw as counsel."<sup>22</sup> It appears in light of the court's decision in *Cardot* that attorneys must provide specific notice to their clients of their intention to withdraw and the exact time and date when they will so move in the appropriate court.

Another case dealing with the attorney's right to withdraw is *May v. Siebert*.<sup>23</sup> In this case the attorney had negotiated a settlement which his clients rejected. The clients then expressed a loss in confidence in the attorney. Consequently, the attorney withdrew with the lower court's approval. He then filed suit for the value of his services. The case presented the West Virginia Supreme Court of Appeals with the opportunity to expand on the principles discussed in *Cardot*.

The court found that mere failure by the client to accept a negotiated settlement and the client's expression of lack of confidence in the attorney are not sufficient causes to justify withdrawal.<sup>24</sup> This forced the court to examine the rights to compensation for an attorney who has withdrawn without good cause. There are some jurisdictions which deny the attorney's right to any compensation when withdrawal is unjustified.<sup>25</sup> The court found this to be unduly harsh, however, and held that "[i]f a lawyer withdraws without good cause, but follows the procedure outlined in *Cardot* . . . and there is no resultant prejudice to the client, the attorney should be permitted to show the court the benefits which his work conferred on the client."<sup>26</sup> Thus, the attorney may be compensated for benefits conferred on the client, but not to a greater extent than the pro-rata share of the fee based on the time spent on the case relative to the time spent by the attorney retained by the client after the withdrawal. The client should not be forced to pay a double fee as a result of an

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<sup>22</sup> *Id.*

<sup>23</sup> 264 S.E.2d 643 (W. Va. 1980).

<sup>24</sup> *Id.* at 646. See Annot., 88 A.L.R.3d 246, 267 (1978). But see *Matararrese v. Wilson*, 202 Misc. 994, 118 N.Y.S.2d 5 (1952).

<sup>25</sup> See 7A C.J.S. *Attorney and Client* § 110 (1980); S. SPEISER, *ATTORNEYS' FEES* § 4:10 at 157 (1973). See also Annot., 88 A.L.R.3d 246, 250-54 (1978).

<sup>26</sup> 264 S.E.2d at 647.

attorney's unjustified withdrawal.<sup>27</sup> The court sought to protect the rights of the abandoned client without providing him with a windfall.

### III. DECLARATORY JUDGMENT

In the case of *Trail v. Hawley*<sup>28</sup> the West Virginia Supreme Court of Appeals addressed the issue of "[w]hether the heirs of a deceased may bring a declaratory judgment action to determine if the deceased's personal representative is prosecuting a wrongful death action in consonance with her fiduciary duty to the heirs."<sup>29</sup>

The case arose as a result of a disagreement between the heirs and the executrix as to the handling of a particular wrongful death action of which the petitioners/heirs would be the ultimate distributees of any award or settlement. The petitioners hired a Beckley law firm to represent their interests in the wrongful death action. The respondent refused to cooperate with the firm and retained instead the services of her nephew, an attorney from outside the State of West Virginia. The respondent claimed that since pursuant to statute<sup>30</sup> she was the only party who could bring the action, she was the ultimate authority with regard to the handling of the suit. The petitioners filed a declaratory judgment action<sup>31</sup> to adjudicate the issue. The trial court dismissed the action for failure to state a claim upon which relief could be granted and the petitioners appealed.

The supreme court in *Trail* held that the circumstances of the case were such as to warrant an adjudication of the issues via a declaratory judgment.<sup>32</sup> In examining the issues involved the

<sup>27</sup> *Id.*

<sup>28</sup> 259 S.E.2d 423 (W. Va. 1979).

<sup>29</sup> *Id.* at 424.

<sup>30</sup> See W. VA. CODE § 55-7-6 (Cum. Supp. 1980).

<sup>31</sup> The petitioners sought judgment on the following questions:

1) [W]hether the petitioners or the respondent have the right to employ an attorney to prosecute the wrongful death action; 2) whether the petitioners or the respondent have the right to control the negotiations of this claim and/or a settlement of the same; and 3) whether the petitioners have the right to file through their attorney a wrongful death action in respondent's name as executrix. 259 S.E.2d at 424.

<sup>32</sup> For a declaratory judgment to be proper there need exist a justiciable controversy between the parties. "[A] justiciable controversy exists when a legal right is claimed by one party and denied by another." *Id.* at 425, citing *Robertson v.*

court agrees that a wrongful death action may only be brought by the personal representative of the decedent's estate;<sup>33</sup> however, this does not vest the personal representative with absolute control over the suit. The personal representative serves as a fiduciary to the ultimate distributees of the estate and has a duty to act in their best interests. Accordingly, the ultimate distributees have a legal right to see that the duty owed them by the personal representative is not violated. The court found the ability to bring a declaratory judgment action to adjudicate the propriety of a personal representative's actions concerning the wrongful death action to be an appropriate and necessary safeguard of that right.<sup>34</sup>

In support of its decision the court cites the lack of alternative remedies available to the heirs under the circumstances of the present case. Should the heirs deem the award of settlement to be insufficient, their only real recourse would be to sue the personal representative or the attorney.<sup>35</sup> This would entail the additional time, expense and uncertainty of another trial in which the heirs would effectively have to re-try the wrongful death action to demonstrate the negligence of the attorney retained by the personal representative. As Justice Neely recognizes in the opinion it is far better to nip the affair in the bud than to let it run its course to the possible unjust enrichment of the personal representative or her appointees.<sup>36</sup>

In addition, the Uniform Declaratory Judgments Act<sup>37</sup> clearly provides that a person interested as or through a fiduciary in the administration of an estate is entitled to a declaration with regard to directing the executors, administrators or trustees to do or abstain from doing any particular act in their fiduciary duty.<sup>38</sup> This could apply to the manner in which the fiduciary handles a wrongful death action for the ultimate benefit of the heirs of the

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Hatcher, 148 W. Va. 239, 135 S.E.2d 675 (1964).

<sup>33</sup> *Id.* at 425. See *Silvious v. Helmick*, 291 F. Supp. 716 (N.D. W. Va. 1968).

<sup>34</sup> *Id.* The court cites *Thompson v. Mann*, 65 W. Va. 648, 64 S.E. 920 (1909), for the proposition that the personal representative serves as a trustee for the heirs. See *Dunsmore v. Hartman*, 140 W. Va. 357, 84 S.E.2d 137 (1954).

<sup>35</sup> *Id.* The meagerness of a verdict alone in a wrongful death action is not sufficient reason to have the verdict set aside. See *Kesner v. Trenton*, 216 S.E.2d 880 (W. Va. 1975); *Legg v. Jones*, 126 W. Va. 757, 30 S.E.2d 76 (1944).

<sup>36</sup> 296 S.E.2d at 426.

<sup>37</sup> W. VA. CODE § 55-13-1 (1966).

<sup>38</sup> W. VA. CODE § 55-13-4 (1966).

estate.

Further credence is lent to the holding in *Trail* by an examination of the traditional reasons for declaratory judgments. Generally, declaratory judgments serve to eliminate possible problems before they develop into actual controversies; thereby saving the parties both time and money.<sup>39</sup>

#### IV. WRIT OF PROHIBITION

The case of *Hinkle v. Black*<sup>40</sup> arose out of the "Willow Island disaster," a construction accident, which resulted in the deaths of fifty-one men. In Pleasants County, site of the disaster, there were as of June 18, 1979, twenty wrongful death actions pending with regard to that disaster. These were all consolidated by the Pleasants County Circuit Court for the purposes of discovery. The circuit court also ruled that all future cases related to the incident filed in Pleasants County would also be consolidated.

In addition to these cases, seven similar suits were filed in Wood County. These cases, upon motion of a common defendant, were removed to Pleasants County and consolidated with the suits originally filed there. The plaintiffs in the Wood County suits filed a writ of prohibition with the West Virginia Supreme Court of Appeals alleging that the lower court had exceeded its powers in transferring the seven cases.

The court seized the opportunity provided by this case to prescribe some general guidelines for "when a litigant can successfully seek a writ of prohibition to serve the office of an interlocutory appeal."<sup>41</sup> The court set forth the two basic criteria to be used in determining whether the writ of prohibition should issue. First, the adequacy of other remedies available to the litigant should be considered.<sup>42</sup> For example, if an appeal after judgment is a viable remedy the court will normally not issue the writ. The

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<sup>39</sup> See Note, *Statutory Remedies: The Declaratory Judgment in West Virginia*, 73 W. VA. L. REV. 165 (1971). See, e.g., *West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W. Va. 832, 42 S.E.2d 46 (1947).

<sup>40</sup> 262 S.E.2d 744 (W. Va. 1980).

<sup>41</sup> *Id.* at 746.

<sup>42</sup> Normally, if there are other remedies available the writ will not be issued. 63 AM. JUR. 2d *Prohibition* § 8 (1972). But see, *Cunard Steamship Co. v. Hudson*, 93 W. Va. 209, 116 S.E. 511 (1923).

second criteria is the "economy of effort among litigants, lawyers and courts."<sup>43</sup>

As a supplement to or a refinement of the two basic criteria, the court discussed other factors affecting the decision of whether to issue the writ. One important consideration was whether the motion involved a clear-cut legal issue or questions of fact.<sup>44</sup> The court recognized that appellate courts are not generally effective finders of fact and, therefore, they should avoid ruling on issues better suited for adjudication at the trial court level. Another factor is the certainty that the case will be completely reversed if the alleged errors are not corrected in advance.<sup>45</sup> In all instances, the court should examine the good faith nature of the application. If a petition is brought before the court merely as a device to "delay, confuse, or confound"<sup>46</sup> the workings of the trial court, the petition will be denied.

The court in *Hinkle* then applied the prescribed criteria to the facts of the case before it. The court recognized that the case was such that a writ of prohibition could properly issue, there being no other adequate remedy available to the plaintiffs; however, the court denied the writ on its merits. The court held that the lower court's actions were taken pursuant to a valid statute.<sup>47</sup> Furthermore, the court found Pleasants County as convenient a forum as Wood County for the plaintiffs; the transfer of these cases did not result in any significant increase in expense or aggravation.

Perhaps the most important aspect of the *Hinkle* case is not the actual holding, but rather its potential impact on the use of writs of prohibition in general. While Justice Neely adamantly as-

<sup>43</sup> 262 S.E.2d at 748.

<sup>44</sup> This distinction has been recognized in the past by the West Virginia court. See, e.g., *Pennsylvania R.R. Co. v. Rogers*, 52 W. Va. 450, 44 S.E. 300 (1903). See also Annot., 92 A.L.R.2d 247, 270-72 (1963).

<sup>45</sup> The court gives various examples of errors of this type. Examples given are "proceedings predicated on unconstitutional statutes; improper joinder of parties defendant; awards of alimony in favor of a guilty party against whom a divorce has been granted; proceedings in direct contravention of a clear, positive command of the State or Federal constitutions; proceedings in contravention of a clear, positive command of a statute." 262 S.E.2d at 750.

<sup>46</sup> 262 S.E.2d at 748.

<sup>47</sup> W. VA. CODE § 56-9-1 (1966).

serts that the opinion is not intended to expand the scope of the writ of prohibition,<sup>48</sup> the tone of the opinion seems to suggest the opposite. The decision's tenor suggests that a writ of prohibition will no longer be viewed as a remedy issued only for extraordinary cause. Rather, the court seems to invite petitions for such writs whenever the criteria prescribed in *Hinkle* are arguably met, and encourages the interruption of suits on the trial level.

This is the aspect of the opinion which Justice Caplan finds objectionable in his concurrence. He agrees with the result in *Hinkle*, but disagrees with the "tenor of the opinion."<sup>49</sup> He states that:

It is my firm conviction that the pronouncements in the opinion in relation to the function of the writ of prohibition are far too broad, that they obliterate the distinction between that extraordinary remedy and appeal and that the use of prohibition in the manner prescribed will cause confusion and delay in the trial of cases.<sup>50</sup>

Perhaps Justice Caplan's fears have been alleviated by the court's subsequent opinion in the case of *State ex rel. Williams v. Narick*.<sup>51</sup> While, on its face, the case is consistent with the principles of *Hinkle*, the tone of the case seems more restrictive with regard to the use of the writ of prohibition and more in keeping with earlier cases. The court seems to place a great deal of emphasis on the need for an "obvious" jurisdictional defect before a writ will issue. For example, the court cited *Woodall v. Laurita*<sup>52</sup> for the proposition that "[i]n absence of jurisdictional defect, the administration of justice is not well served by challenges to discretionary rulings of an interlocutory nature."<sup>53</sup> With regard to petitions involving alleged abuse of authority by the lower court, the court in *Williams* indicated that only when abuse is "so *flagrant and violative* of petitioner's rights as to make a remedy

<sup>48</sup> 262 S.E.2d at 750.

<sup>49</sup> *Id.* at 752 (Caplan, J., concurring).

<sup>50</sup> *Id.*

<sup>51</sup> 264 S.E.2d 851 (W. Va. 1980).

<sup>52</sup> 156 W. Va. 707, 195 S.E.2d 717 (1973). In this case Justice Neely writing for the majority took what seems to be a more restrictive view of a writ of prohibition than he expressed in *Hinkle*. See 262 S.E.2d at 752 (Caplan, J., concurring).

<sup>53</sup> 264 S.E.2d at 854. See *State v. Milam*, 260 S.E.2d 295 (W. Va. 1979); *State ex rel. Peaches v. Sencindiver*, 233 S.E.2d 425 (W. Va. 1977).

by appeal inadequate will a writ of prohibition issue.”<sup>64</sup>

Viewing the tone of the *Williams* case, it is arguable that the court's view of the writ of prohibition has not changed significantly and that whatever *Hinkle* may have implied by its tone is not the actual position taken by the court. It appears that the present position of the court is to discourage writs of prohibition, except in the extraordinary situations in which they have traditionally been granted.

*Randal A. Minor*

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<sup>64</sup> 264 S.E.2d at 854-55 (emphasis added) (quoting *Woodall v. Laurita*, 156 W. Va. 707, 195 S.E.2d 717 (1973)).

# PROPERTY

## I. ESTATES AND TRUSTS

In *Berry v. Union National Bank*<sup>1</sup> the West Virginia court was confronted with a collision of two conflicting principles of law: the strong presumption against intestacy<sup>2</sup> and the remorseless application of the Rule Against Perpetuities.<sup>3</sup> By adopting the doctrine of equitable modification the court compromised the two principles in a manner whereby the testator's intent is given effect without total destruction of the Rule Against Perpetuities.

The equitable modification doctrine made applicable to non-charitable trusts in *Berry* is very similar to the cy pres doctrine enacted by the West Virginia Legislature in 1931.<sup>4</sup> The latter provides an escape from the Rule Against Perpetuities as applied to charitable trusts. The action is also in accord with a national trend away from strict application of the rule.<sup>5</sup>

<sup>1</sup> 262 S.E.2d 766 (W. Va. 1980).

<sup>2</sup> See, e.g., *Rastle v. Gamsjager*, 151 W. Va. 499, 153 S.E.2d 403 (1967); *Cowherd v. Fleming*, 84 W. Va. 227, 100 S.E. 84 (1919).

<sup>3</sup> The Rule Against Perpetuities requires that every executory limitation in order to be valid shall be so limited that it must necessarily vest, if at all, within a life or lives in being, ten months and twenty-one years thereafter, the period of gestation being allowed only where it is a factor. *First Huntington Nat'l Bank v. Gideon-Broh Realty Co.*, 139 W. Va. 130, 79 S.E.2d 675 (1953); *Brookover v. Grimm*, 118 W. Va. 227, 190 S.E. 697 (1937).

<sup>4</sup> W. VA. CODE § 35-2-2 (1966).

<sup>5</sup> At present eighteen states have either statutorily or judicially reformed the application of the Rule Against Perpetuities by adopting the cy pres doctrine, alternatively called equitable reformation or equitable approximation.

Statutory reforms: California—CAL. CIV. CODE § 715.5 (Supp. 1979) (West); Connecticut—CONN. GEN. STAT. ANN. § 45-96 (Supp. 1979) (West); Florida—FLA. STAT. ANN. § 689.22(4) (Supp. 1979) (West); Idaho—IDAHO CODE, § 55-111 (Supp. 1979); Illinois—ILL. ANN. STAT. ch. 30, § 194(c) (2) (Supp. 1979) (Smith-Hurd); Kentucky—13 KY. REV. STAT. ANN. § 381.216 (1972) (Baldwin); Maine—ME. REV. STAT. ANN. tit. 33, § 102 (1978); Maryland—MD. EST. & TRUSTS CODE ANN. § 11-103(b) (1974); Massachusetts—MASS. GEN. LAWS ANN. ch. 184A, § 2 (Supp. 1977) (West); Missouri—MO. ANN. STAT. § 442.555(2) (Supp. 1979) (Vernon); New York—N.Y. EST., POWERS & TRUSTS LAW § 9-1.2 (Supp. 1967) (McKinney); Ohio—OHIO REV. CODE ANN. § 2131.08(C) (Supp. 1976) (Page); Oklahoma—OKLA. STAT. ANN. tit. 60, §§ 75-78 (Supp. 1979) (West); Texas—TEX. CIV. CODE ANN. tit.



Although the door is now open to modification of trusts which violate the rule, the court still professes support of the underlying policies of the Rule Against Perpetuities and will deny validity to an interest which must vest beyond the time limitations provided in the rule.<sup>6</sup> To determine whether a non-charitable devise or bequest which violates the rule can be equitably modified, the court devised the following test:

- (1) The testator's intent is expressed in the instrument or can be readily determined by a court;
- (2) The testator's general intent does not violate the Rule Against Perpetuities;
- (3) The testator's particular intent, which does violate the rule, is not a critical aspect of the testamentary scheme; and
- (4) The proposed modification will effectuate the testator's general intent, will avoid the consequences of intestacy, and will conform to the policy considerations underlying the rule.<sup>7</sup>

The questioned will in *Berry* expressed a general intention to provide funds for the education of certain family members and a particular intention that the trust was to continue for twenty-five years. The general intention does not violate the common law rule, but the specific intention violates the rule by four years. There is no indication that the four-year overrun is a critical aspect of the testamentary scheme. The new doctrine allows the trust to be modified to run twenty-one years and thereby give effect to the testator's general intent, avoid intestacy, and still conform to the underlying considerations of the rule.

*Mason v. Mason*<sup>8</sup> marks the third time that a will containing questionably conditional language has reached the West Virginia court for interpretation, and each time questionable language has been held to create an absolute will.<sup>9</sup>

129lb, § 2 (Supp. 1978) (Vernon); Vermont—Vt. STAT. ANN. tit. 27, § 501 (1975 Rep. Ed.).

Judicial reforms: Hawaii—In Re Estate of Chun Quan Yee Hop, 52 Hawaii 40, 469 P.2d 183 (1970); Mississippi—Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962); New Hampshire—Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891).

<sup>6</sup> 262 S.E.2d at 771.

<sup>7</sup> *Id.*

<sup>8</sup> 268 S.E.2d 67 (W. Va. 1980).

<sup>9</sup> Questionable language previously held to create an absolute will was: "If anything [sic] happens to us on this trip that we shouldn't return, I want my

The holographic will in question began, "Nov 4th 1973 — I am in the hospital for surgery, and in case I do not survive. Everything I have belongs to Mervin."<sup>10</sup> The testator survived surgery and died January 6, 1976, of an unrelated illness. Although no party questioned the will's validity, the circuit court held the language created a conditional will and declared the deceased to be intestate.

The majority of wills which contain questionably conditional language are written immediately prior to surgery or at a time of serious illness.<sup>11</sup> The decisions indicate that there are no technical words which will always determine the writer's intent, nor is there uniformity in the holdings.<sup>12</sup> Thus, to determine if the maker intended the will to be absolute—in which case the conditional words are considered to be the motivation for making a will—or whether the words created a condition precedent, the court is forced to consider both the text and the surrounding facts and circumstances.

There is strong authority that courts prefer finding a will absolute.<sup>13</sup> Considering the circumstances under which the will was written and the fact that Mrs. Mason kept it for more than three years after her recovery, the court felt justified in avoiding the creation of intestacy. In ruling the will to be absolute, the court stated the language in question was indicative of why Mrs. Mason made a will and did not establish conditions for its activation. As is evidenced by the court's method in arriving at this decision, the

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property and all my interest in the property to be . . . " *National Bank of Commerce v. Wehrle*, 124 W. Va. 268, 274, 20 S.E.2d 112, 115 (1942); and, "if I get drowned this morning, March 7, 1872, that I bequeath all my property . . . " *French v. French*, 14 W. Va. 458, 462 (1877).

<sup>10</sup> 268 S.E.2d at 68.

<sup>11</sup> Wills made in anticipation of surgery were held absolute *in re Cook*, 173 Cal. 465, 160 P. 553 (1916); and *in re Dowling's Estate*, 16 Pa. D. & C. 381 (1932); and held contingent in *Walker v. Hibbard*, 185 Ky. 795, 215 S.W. 800 (1919).

<sup>12</sup> See, e.g., *Robnett v. Ashlock*, 49 Mo. 171 (1872), "I this day start to Kentucky; I may never get back; if it should be my misfortune, I give my property to my sister's children," (conditional); as compared with *Ferguson v. Ferguson*, 121 Tex. 119, 45 S.W.2d 1096 (1931), "I am going on a journey, and I may never come back alive, so I make this will . . . " (absolute).

<sup>13</sup> *Eaton v. Brown*, 193 U.S. 411 (1904); *In re Desmond's Estate*, 223 Cal. App. 2d 211, 35 Cal. Rptr. 737 (1963); *National Bank of Commerce v. Wehrle*, 124 W. Va. 268, 20 S.E.2d 112 (1942).

area of conditional language in wills is still without guidelines and uniformity. Decisions will continue to be made on a case by case approach, with the court's presumption of testacy bearing heavy weight.

In *Loar v. Massey*<sup>14</sup> the West Virginia court was asked to rule on an appeal from a consent decree which established a trust and to determine whether the language of a will which created a life estate could be coupled with a grant of powers of disposal to create a fee simple absolute.

No objection or reservation was raised when the lower court issued the consent decree which construed the will in question to have created a trust.<sup>15</sup> The court followed a consistent line of authority in ruling that by consenting to the decree the appellant had effectively waived any issue arising therefrom,<sup>16</sup> even if the decree was in fact erroneous.<sup>17</sup>

The appellant's second assertion was that the will granted her fee simple ownership, premised on the theory that a life estate coupled with a general power to consume expressed an intent on the part of the testator to create a fee simple. Appellant reached this conclusion from the following: "I give, devise and bequeath to Ruth Ann Welsh [*sic*] for her lifetime only, all my personal property . . . and the right to Miss Welsh [*sic*] to consume as much thereof as may be necessary to keep her in health . . . ."<sup>18</sup>

The archaic theory of property law which once allowed this coupling of interests has long been overruled in a vast majority of jurisdictions<sup>19</sup> and was specifically abrogated by the West Virginia legislature in 1931.<sup>20</sup> Further, the power of disposal granted

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<sup>14</sup> 261 S.E.2d 83 (W. Va. 1979).

<sup>15</sup> *Id.* at 85.

<sup>16</sup> *Hunter v. Kennedy*, 20 W. Va. 343 (1882); *Rose & Co. v. Brown*, 17 W. Va. 649 (1881); *Monion v. Fahy*, 11 W. Va. 482 (1877).

<sup>17</sup> *Swift & Co. v. United States*, 276 U.S. 311 (1928); *Herbert C. Heller & Co. v. Duncan*, 110 W. Va. 628, 159 S.E. 52 (1931).

<sup>18</sup> 261 S.E.2d at 87.

<sup>19</sup> *E.g.*, *Mead v. Welch*, 95 F.2d 617 (9th Cir. 1938); *In re Smyth's Estate*, 132 Cal. App. 2d 343, 282 P.2d 141 (1955); *Rogers v. Rogers*, 221 S.C. 360, 70 S.E.2d 637 (1952); *Swan v. Pople*, 118 W. Va. 538, 190 S.E. 902 (1937).

<sup>20</sup> W. VA. CODE § 36-1-16 (1966). This statute provides that an interest in real property given by will with a limitation over and a power of disposal creates an

here was of limited nature, as evidenced by the testator's words, "to use so much as may be necessary to keep her in health." The statute has been construed as providing that a life tenant with unlimited powers of use and disposal takes less than a fee simple.<sup>21</sup> In cases where the language of a will is clear, as it is here, any other grant to the devisee would only serve to contravene the intention of the testator.

The appellant also alleged that "to keep her in health" were not restrictive words which would limit her power to invade the trust until such time as she was destitute. The lower court defined this phrase to include expenses for food, clothing, medicine, doctor's services, and hospital care.<sup>22</sup> As was noted by the court, there is no other case in West Virginia or elsewhere which defines "to keep her in health"; thus, the lower court's interpretation stands as a valid construction of the testator's intent.

## II. COAL, OIL, AND GAS

In *Buffalo Mining Co. v. Martin*,<sup>23</sup> a lessee of coal underlying a surface estate attempted to erect power transmission lines on the surface to serve a ventilation system for the lessee's underground mining operations. The deed through which the lessee had obtained mining rights contained no express right to erect power transmission lines on the surface estate.<sup>24</sup> The lessee enjoined the surface owner from interfering with the project. From this injunction the surface owner appealed.

*Buffalo Mining* posed to the court the issue of whether the right to erect power transmission lines on the surface estate was a right implied in the 1890 severance deed from which the lessee's interest derived. Although the court partially resolved the issue by relying on the customary rule that permissible surface uses by a mineral grantee are those reasonably necessary to extract the minerals,<sup>25</sup> it also adopted a type of balancing test, based on the

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estate subject to such limitation over unless the power of disposal has been lawfully exercised.

<sup>21</sup> *In re Estate of Evans*, 156 W. Va. 425, 194 S.E.2d 379 (1973).

<sup>22</sup> 261 S.E.2d at 88.

<sup>23</sup> 267 S.E.2d 721 (W. Va. 1980).

<sup>24</sup> *Id.* at 722.

<sup>25</sup> *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 61 S.E.2d 633 (1950); *Squires v. Lafferty*, 95 W. Va. 307, 121 S.E. 90 (1924); *Porter v. Mack Mfg. Co.*, 65

court's re-examination of past cases.<sup>26</sup>

The surface owner argued that the court had in the past refused to imply the right to surface mine in a severance deed because that mining method was not technologically feasible nor contemplated by the parties at the time the deed was made.<sup>27</sup> By analogy, the surface owner reasoned that since stringing power transmission lines over land was neither technologically available nor contemplated by the parties to the severance deed, there was no implied right to erect power transmission lines on the surface estate.

The *Buffalo Mining* court redefined the rationale of past cases involving the implied right to surface mine, reasoning that the unforeseen and unanticipated nature of the alleged right to surface mine was not the real reason the right was denied. Rather, the court stated that "the fundamental basis . . . for the decisions is whether the use sought was substantially compatible with the surface rights granted to the mineral owner and whether it substantially burdens the surface owner's estate."<sup>28</sup>

Under *Buffalo Mining*, the party seeking to establish an implied surface use must show that it is reasonably necessary to extract the minerals and not overly burdensome to the rights of the surface owner.<sup>29</sup> The court's previous interpretation of its "technological advancement" cases on implied mining rights would allow a proposed use to be denied for the sole reason that it was not intended by the parties to the severance deed, without regard to the degree of harm to the surface owner's rights.<sup>30</sup> The court abandoned this interpretation, feeling that whatever might be lost in sacrificing the parties' putative intentions is offset by the practicality of permitting efficient and relatively harmless new im-

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W. Va. 636, 64 S.E. 853 (1909).

<sup>26</sup> *Brown v. Crozer Coal and Land Co.*, 144 W. Va. 296, 107 S.E.2d 777 (1959); *Oresta v. Romano Bros., Inc.*, 137 W. Va. 633, 73 S.E.2d 622 (1952); *West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W. Va. 832, 42 S.E.2d 46 (1947).

<sup>27</sup> See cases cited *supra* note 4.

<sup>28</sup> 267 S.E.2d 721, 724 n.3.

<sup>29</sup> *Id.* at 725.

<sup>30</sup> In a dissent by Justice Harshbarger (McGraw, J., concurring), the majority is taken to task for ignoring the intentions of the parties to the severance deed and is warned that such disregard opens the door for the court to fashion contracts without regard to what the parties wanted. 267 S.E.2d at 726.

plied rights.

The court also indicated its receptiveness to a common-sense argument that links the likelihood of finding a particular use an implied right to the broadness of the set of corresponding express rights: the broader the express rights in a severance deed, the easier for the court to find a correlative implied right.<sup>31</sup> In this same connection, the court failed to invalidate statements in a prior case to the effect that express mining rights in a severance deed negate implied mining rights.<sup>32</sup> The court acknowledged this principle and stated only that it did not control in the present case. This suggests the court's affirmation of the principle's continuing validity. Persuasive authority exists, however, to support a rule of law that express mining rights do not negate implied mining rights.<sup>33</sup>

In determining implied surface uses by a mineral grantee, ad hoc examination of the burden to the surface owner is now the measure, not strict adherence to the rights intended by the parties to a severance deed made many years ago. The case strikes a balance; it endeavors to protect the rights of surface owners while allowing for technological advances in the extraction of minerals.

### III. SUBDIVISION CONTROL

*Singer v. Davenport*<sup>34</sup> presented the court with an opportunity to develop the law of subdivision control in West Virginia. In this case, the Jefferson County Planning Commission denied a subdivision developer's application for approval of a plat, relying on a broad subdivision control statute which described general guidelines to be used in determining whether to approve a plat.<sup>35</sup> In trial court, the developers sought and won an order compelling

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<sup>31</sup> 267 S.E.2d at 725.

<sup>32</sup> *West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W. Va. 832, 836, 42 S.E.2d 46, 49 (1947).

<sup>33</sup> *Cole v. Ross Coal Co.*, 150 F. Supp. 808 (S.D. W. Va. 1957). In *Cole*, the court held that "expressed mining rights are in addition to, and not in substitution for, the implied mining rights which the law gives the owner of coal." 150 F. Supp. at 816. See Donley, *Coal Mining Rights and Privileges in West Virginia*, 52 W. VA. L. REV. 32, 39 (1950).

<sup>34</sup> 264 S.E.2d 637 (W. Va. 1980).

<sup>35</sup> W. VA. CODE § 8-24-30 (1976 Replacement Vol.).

approval of the plat.<sup>36</sup>

On appeal, the commission argued that its decision to reject the plat was proper because the plat was incompatible with the commission's comprehensive plan;<sup>37</sup> and that it possessed statutory authority to disapprove plats.<sup>38</sup>

The court ruled that the comprehensive plan was not violated,<sup>39</sup> but found that, in any event, such plans do not have the force of law and serve only as a foundation for zoning ordinances,<sup>40</sup> none of which had ever been passed by the Jefferson County electorate.<sup>41</sup> The commission's statutory authority argument was also rejected and it is the court's analysis on this point that is of significance.<sup>42</sup>

The court found that the broad language of West Virginia Code § 8-24-30,<sup>43</sup> on which authority was based, to be an insufficient measure for planning commissions to use in rejecting subdivision plats. The broad language allowed the commission too much discretion in rejecting subdivision plats<sup>44</sup> and created an atmosphere in which highly subjective and arbitrary decisions could be made.<sup>45</sup> The ambiguity of the statute failed to supply developers with the specificity that would enable them to "know in advance what is required of them and what standards and procedures will apply."<sup>46</sup> The commission's use of West Virginia Code § 8-24-30 as a measure of disapproval of subdivision plats effectively allowed it to accomplish zoning through vague or non-existent subdivision planning regulations. Zoning is a function clearly beyond the commission's legal capacity.<sup>47</sup> Thus, in order to be

<sup>36</sup> 264 S.E.2d at 639.

<sup>37</sup> W. VA. CODE § 8-24-16 (1976 Replacement Vol.). A comprehensive plan provides a base for the future use and development of property in a jurisdictional area. See 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 12.03 (1979).

<sup>38</sup> See note 13 *supra*.

<sup>39</sup> 264 S.E.2d at 640.

<sup>40</sup> *Id.* See 1 A. RATHKOPF, *supra* note 37, at § 12.02.

<sup>41</sup> 264 S.E.2d at 640.

<sup>42</sup> *Id.* at 642.

<sup>43</sup> (1976 Replacement Vol.).

<sup>44</sup> 264 S.E.2d at 642.

<sup>45</sup> See 3 R. ANDERSON, *AMERICAN LAW OF ZONING* § 23.19 (2d ed. 1977 & Supp. 1980).

<sup>46</sup> 264 S.E.2d at 642.

<sup>47</sup> Zoning relates to whether property can be used for a particular purpose

within its authority in deciding on a plat application, a planning commission must act pursuant to specific and standardized subdivision regulations<sup>48</sup> which have the effect of expanding upon vague statutory guidelines. The reasons the statutory authority was found insufficient are the same reasons the specific subdivision regulations were found necessary.

*Singer* is a signal to planning commissions that standardless decision-making in subdivision development will not be tolerated. The case brought West Virginia into line with what is recognized as the desirable practice of refining broad statutory guidelines through the adoption of particularized subdivision regulations.<sup>49</sup>

#### IV. EASEMENTS

In *Mays v. Hogue*,<sup>50</sup> the court was confronted with two issues relating to the law of easements. The first issue was whether a right of way<sup>51</sup> over a servient estate was an easement appurtenant to the dominant estate or an easement in gross. Secondly, the court was asked whether and to what extent the owner of a dominant estate was obligated to maintain a road over the right of way.

Citing West Virginia precedent,<sup>52</sup> the court employed traditional criteria to decide whether the right of way in question was appurtenant to the land or in gross.<sup>53</sup> To be appurtenant to the land the right of way must by nature be a useful appendage to the dominant estate and must benefit the possessor of the dominant estate. Further, there must be an absence of evidence showing that the parties to the easement agreement intended the ease-

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while the Commission's authority (planning and regulation) relates to the manner in which property is developed. 264 S.E.2d at 641.

<sup>48</sup> Subdivision regulations are permitted under W. VA. CODE §§ 8-24-28 to -35 (1976 Replacement Vol.). In *Singer*, the commission had enacted some subdivision regulations. The sufficiently specific ones were complied with and the insufficiently specific ones were not relied on in rejecting the plat.

<sup>49</sup> 3 R. ANDERSON, *supra* note 45, at § 23.19.

<sup>50</sup> 260 S.E.2d 291 (W. Va. 1979).

<sup>51</sup> Under the law of West Virginia, a right of way is an easement only. *Wells v. Air Prod. and Chem.*, 383 F. Supp. 146 (N.D. W. Va. 1974).

<sup>52</sup> *Post v. Bailey*, 110 W. Va. 504, 159 S.E. 524 (1931); *Jones v. Island Creek Coal Co.*, 79 W. Va. 532, 91 S.E. 391 (1917).

<sup>53</sup> 2 AMERICAN LAW OF PROPERTY § 8.6 (A.J. Casner ed. 1952).



ment to be in gross, which is a mere personal right extinguishable on transfer. The court found these criteria were met and affirmed a trial court ruling that the right of way was appurtenant to the land.<sup>54</sup>

The servient estate owner argued on appeal that the easement could not be appurtenant to the land because the deed which created it failed to use words of limitation in the granting clause.<sup>55</sup> It was contended that because an easement appurtenant to the land is an estate of inheritance, words of limitation were necessary to create it.

The court disposed of this argument by relying on cases from other jurisdictions which hold that words of limitation are not necessary to create an easement appurtenant.<sup>56</sup> Two of the cases cited by the court for this proposition rely on state statutes that make words of limitation unnecessary to create an estate of inheritance.<sup>57</sup> Although West Virginia has a statute quite similar to the ones relied on in those two cases,<sup>58</sup> the *Mays* court did not apply it to support its holding on this issue.<sup>59</sup>

In regard to the second issue in *Mays*, the court found that the deed creating the easement did impose some duty on the owners of the dominant estate to maintain the road over the ease-

<sup>54</sup> 260 S.E.2d at 294.

<sup>55</sup> Words of limitation extend the created estate to an estate of inheritance. *Ball v. Payne*, 27 Va. (6 Rand.) 73 (1827).

<sup>56</sup> *Cleveland, C. & St. Louis Ry. v. Griswold*, 51 Ind. App. 497, 97 N.E. 1030 (1912); *Teachout v. Capital Lodge*, 128 Iowa 380, 104 N.W. 440 (1905); *United States Pipeline Co. v. Delaware, L. & W. R. Co.*, 62 N.J.L. 254, 41 A. 759 (1898).

<sup>57</sup> IND. CODE ANN. § 32-1-2-14 (1973) is relied on expressly; IOWA CODE ANN. § 557.2 (1950) is applied by a case on which *Teachout v. Capital Lodge*, 128 Iowa 380, 104 N.W. 440 (1905) directly based its holding; *Karmuller v. Krotz*, 18 Iowa 352 (1865).

<sup>58</sup> W. VA. CODE § 36-1-11 (1966) states in pertinent part:

When any real property is conveyed . . . to any person, . . . and no words of limitation are used in the conveyance . . . such conveyance . . . shall be construed to pass the fee simple, or the whole estate or interest . . . the . . . grantor had power to dispose of, in such real property, unless a contrary intention shall appear in the conveyance. . . .

<sup>59</sup> *Bennet v. Charles Corp.*, 226 S.E.2d 559 (W. Va. 1976) held that "[a]n easement . . . is an incorporeal hereditament and as such is a species of real property . . . subject to the provisions of the statutes governing the conveyance or creation of estates in land." 226 S.E.2d at 563.

ment, based on the language of the deed creating the easement.<sup>60</sup> The court found itself “[un]prepared to address the question of whether or not the owner of a dominant estate has an obligation *arising from law* to maintain a road over an easement.”<sup>61</sup> Thus, the court’s decision on this issue was grounded in the facts of the case and not in law. Possibly, the court could have resolved the problem on a non-factual basis by looking to *Carson v. Jackson Land and Mining Co.*,<sup>62</sup> wherein it was held that the law presumes a duty to maintain on the party benefitting from the easement, that is, the owner of the dominant estate.

*Paul A. Billups*  
*Nicholas L. DiVita*

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<sup>60</sup> 260 S.E.2d at 294.

<sup>61</sup> *Id.* (emphasis added).

<sup>62</sup> 90 W. Va. 781, 111 S.E. 846 (1922).

## TAXATION

### I. PROPERTY TAX ASSESSMENT

Whether a third party taxpayer has standing to contest the property assessments of other taxpayers in his county was the controlling issue in *Tug Valley Recovery Center, Inc. v. Mingo County Commission*.<sup>1</sup> The companion cases before the court involved the contesting of assessed values for coal lands owned by one taxpayer in Mingo County, and the underassessment of all coal lands in Lincoln County. The plaintiffs in each suit based their complaints on the comparison between the values actually assessed and those values arrived at as the "true and actual" value by the appraisal conducted by the State Tax Commissioner for all non-utility real property in the state.<sup>2</sup>

Not only did the court recognize that "any person who is aggrieved by any assessment shall have the right to appeal that assessment,"<sup>3</sup> but also that a taxpayer "may [force] . . . by writ of mandamus" the county commission to assess property at its true and actual value in accord with the State Tax Commissioner's appraisal.<sup>4</sup> The court noted that the "direct and substantial" interest requirement for standing<sup>5</sup> is met for every person affected by the tax base since the lost tax revenues from an underassessment are distributed to all other taxpayers in that particular county.

The remedy for an underassessment, though, is not a corresponding reduction in the assessment of the contesting taxpayer's property; rather, it is to compel the taxing authorities to assess all property fully.<sup>6</sup> The authority to compel the county taxing authorities to properly assess property is vested by statute in the circuit court.<sup>7</sup> Consequently, if an aggrieved taxpayer has ex-

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<sup>1</sup> 261 S.E.2d 165 (W.Va. 1979).

<sup>2</sup> W. VA. CODE § 18-9A-11 (1977 Replacement Vol.).

<sup>3</sup> 261 S.E.2d at 170.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 172.

<sup>6</sup> See *Liggett Co. v. Lee*, 288 U.S. 517 (1933); *Bd. of County Comm'rs v. Buch*, 190 Md. 394, 58 A.2d 672 (1948).

<sup>7</sup> W. VA. CODE § 11-3-25 (1977 Replacement Vol.).

hausted all administrative remedies, he has a right of appeal to the circuit court which shall base its decision on the State Tax Commissioner's appraisal. While the court dealt only with standing of a taxpayer contesting assessments in his home county, the wording of the applicable statute is sufficiently broad to entitle suits by taxpayers contesting assessments in counties other than their own.<sup>8</sup>

The proper assessment of property was also in issue in *In re Assessment of U.S. Steel Corp.*<sup>9</sup> The appellant, U.S. Steel, was contesting the assessment of its coal properties at 108% of the State Tax Commissioner's appraisal value, while the property of all other coal companies in the county was assessed at 68% of its appraised value. While the circuit court recognized the impropriety of the assessment, it only reduced the appellant's assessment to 100% of the appraisal value.<sup>10</sup>

The West Virginia Supreme Court of Appeals noted that county assessors are granted the "discretion to set the assessed value of property between fifty and one hundred percent of the appraised value."<sup>11</sup> This discretion is limited however by the West Virginia Constitution.<sup>12</sup> In recognizing this limitation, the court affirmed its decision in *In re Assessment of Kanawha Valley Bank*<sup>13</sup> which held:

Where there is a systematic plan to assess all property of a certain species at a particular percentum of its value, a showing that there were sporadic variations to the plan of assessment will not deprive the owner of property of another species of his right to relief under the provisions of Section 1, Article X of the Constitution of this State, where the property of the latter was assessed at a substantially higher percentum of actual value than the approximate level of valuation of the other species of property of equal value.<sup>14</sup>

<sup>8</sup> *Id.*

<sup>9</sup> 268 S.E.2d 128 (W.Va. 1980).

<sup>10</sup> *Id.* at 131.

<sup>11</sup> W. VA. CODE § 18-9A-11 (1977 Replacement Vol.); W. VA. CODE § 11-3-1 (Cum. Supp. 1980).

<sup>12</sup> W. VA. CONST. art. X, § 1 states that "No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value."

<sup>13</sup> 144 W.Va. 346, 109 S.E.2d 649 (1959).

<sup>14</sup> *Id.* at 347, 109 S.E.2d at 651.

Thus, a taxpayer may contest the assessment of his property where the property of other taxpayers is assessed at a different percent of its value. This is true even if the contesting taxpayer's property is assessed at a value within the limitations imposed by the statute. The taxpayer's remedy in such a case is to have the assessed value of his property lowered to conform with the systematic assessment of other taxpayers.

## II. EXPENDING SPECIAL SCHOOL LEVY FUNDS

The case of *Thomas v. Board of Education of McDowell County*<sup>15</sup> dealt with the correct expenditure of funds derived from a special levy passed by the voters of McDowell County in conjunction with state minimum salary laws for school personnel. The special levy in question had been adopted in 1974, and provided for a supplement to the state basic salary for teaching and non-teaching employees. The terms of the levy had been complied with until July 1, 1975, when a new state minimum salary plan was implemented.<sup>16</sup> Subsequently, the county board of education began applying the special levy funds for non-teaching employees toward the new state minimum salary amounts, thus eliminating the benefits of the special levy supplement. The county board was prompted to make this application based on a determination by the State Department of Education and the State Board of School Finance that "county special levy funds could be used in computing the county's local share of financing its schools."<sup>17</sup>

The court noted the general rule that "the purpose for which funds were raised at a special election levy is to be determined by the proposal approved by the voters at the polls,"<sup>18</sup> and concluded that the purpose intended in this case was to provide a supplement to the state minimum salary for county non-teaching

<sup>15</sup> 261 S.E.2d 66 (W. Va. 1979).

<sup>16</sup> W.VA. CODE § 18A-4-8 (1977 Replacement Vol.).

<sup>17</sup> 261 S.E.2d at 70. The county's local share of financing its schools is governed by W.VA. CODE § 18-9A-11 (1977 Replacement Vol.) and is based on *regular* county levies for general current expense purposes. This local share is deducted from the county's "basic foundation program cost" (as determined by W.VA. CODE §§ 18-9A-3 through 10 (1977 Replacement Vol.) in arriving at the amount of total state aid to the county.

<sup>18</sup> See, e.g., *Haws v. County Court*, 86 W.Va. 650, 104 S.E. 119 (1920).

employees. The court further concluded that the state aid formula, as computed under Chapter 18, Article 9A of the West Virginia Code, does not require the inclusion of special levy funds in determining the local share of school financing.<sup>19</sup>

The result of this decision is to prohibit county school boards from expending special levy funds for any other purpose than that approved by the county's voters.

*John Kent Dorsey*

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<sup>19</sup> 261 S.E.2d at 71.

## TORTS

### I. RETALIATORY DISCHARGE

Until 1978, an employee working under an at will employment contract could be discharged at any time and without cause.<sup>1</sup> In *Harless v. First National Bank in Fairmont*,<sup>2</sup> the West Virginia Supreme Court of Appeals limited the employer's right of summary dismissal to the extent that his motive does not contravene public policy.<sup>3</sup> The *Harless* court restricted its holding to an affirmance of the plaintiff's cause of action; the full implications of the court's departure from the established rule were not addressed.<sup>4</sup>

In *Shanholtz v. Monongahela Power Co.*,<sup>5</sup> the supreme court ruled on the nature of its new cause of action for retaliatory discharge. Shanholtz, the plaintiff, worked for the defendant under an at will employment contract. In September, 1976, he filed a claim for occupational disease benefits; within a few weeks the defendant discharged him.<sup>6</sup>

Nearly three years after his dismissal, on August 14, 1979, Shanholtz filed an action against his former employer. Alleging that his discharge was in retaliation for his workmen's compensation claim, the plaintiff charged breach of the employment contract. Shanholtz added a charge of humiliation, embarrassment and damage to his reputation, proximately caused by the defendant's "negligent, tortious and unlawful termination of his employment."<sup>7</sup>

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<sup>1</sup> *Wright v. Standard Ultramarine & Color Co.*, 141 W.Va. 368, 90 S.E.2d 459 (1955); *Resener v. Watts, Ritter & Co.*, 73 W.Va. 342, 80 S.E. 839 (1913). *Accord*, *Blackhurst v. E. I. du Pont de Nemours & Co.*, 294 F.Supp. 128 (S.D. W. Va.), *aff'd*, 405 F.2d 499 (4th Cir. 1968).

<sup>2</sup> 246 S.E.2d 270 (W.Va. 1978).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*, at 275, n. 5.

<sup>5</sup> 270 S.E.2d 178 (W.Va. 1980).

<sup>6</sup> Shanholtz's letter of termination said only that he was "unable to satisfactorily fulfill [his] job requirements." *Id.* at 180.

<sup>7</sup> *Id.* Another basis of his suit was breach of statutory duty under W.Va. CODE § 23-5A-1 (Cum. Supp. 1980), requiring that employers not discriminate against

The plaintiff claimed recovery on both contract and tort theories. The choice between the two theories became important after Monongahela Power Co. raised the affirmative defense that the plaintiff's suit was barred by the statute of limitations.<sup>8</sup> On the defendant's motion the circuit court dismissed the action. It ruled that an action for retaliatory discharge is a tort action, and that the two-year limitation had expired before the suit was filed. Despite the dismissal, the circuit court certified to the supreme court questions about the nature of the action and the effect of the two-year statute of limitations.<sup>9</sup>

The supreme court had to decide whether the retaliatory discharge action sounds in tort or in contract. If the action is in tort, Shanholtz's claim was invalid; if the action is in contract, the plaintiff could continue the action. In making its decision, the court relied on a footnote in *Harless*:

Since this case is before us on a certified question solely on the issue of whether a cause of action exists, we do not reach the issue of the element of damages except to say *the cause of action is one in tort* and it therefore follows that rules relating to tort damages would be applicable.<sup>10</sup>

In *Shanholtz* the court elevated this dictum to a rule, holding that the action is in tort. The plaintiff's action was barred by the tort statute of limitations.<sup>11</sup>

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employees because of attempts to receive workmen's compensation. The circuit court and the supreme court rejected this theory, holding that the statute, effective on July 1, 1978, had only prospective application.

<sup>8</sup> W.Va. CODE § 55-2-12 (1966).

<sup>9</sup> The questions certified are:

1. Does an employee, under an at-will employment contract, have a cause of action for breach of contract if the employer discharges him in retaliation for filing a workmen's compensation claim, as stated in Count I of the plaintiff's complaint, thereby bringing him within the five-year rather than the two-year statute of limitations?

2. Is the cause of action stated in Counts II and III of plaintiff's complaint barred by the two-year statute of limitations? 270 S.E.2d at 180.

<sup>10</sup> 246 S.E.2d at 275, n. 5 (emphasis added).

<sup>11</sup> In reaching its holding the court considered the principle that "[a] complaint that could be construed as being either in tort or on contract will be presumed to be on contract whenever the action would be barred by the statute of limitation if construed as being in tort." *Cochran v. Appalachian Power Co.*, 246 S.E.2d 624, 628 (W.Va. 1978). The court distinguished that principle. 270 S.E.2d



The conclusion that a *Harless* type action is in tort is supported by more than a footnote. The tenor of the *Harless* opinion reflects the court's understanding that it was dealing with a tort action.<sup>12</sup> The majority of other jurisdictions that allow an action for retaliatory discharge follows the public policy rationale and bases the action in tort.<sup>13</sup> The weight of scholarly opinion also supports a tort theory.<sup>14</sup>

Implicit in the court's development of retaliatory discharge are several benefits. Because the action sounds in tort, the complexities of contract law, such as implied covenants, mutuality of obligation and waiver of restrictions, can be disregarded.<sup>15</sup> Moreover, plaintiffs can more easily recover damages for mental distress<sup>16</sup> and punitive damages.<sup>17</sup>

## II. IMPLIED INDEMNITY

The West Virginia Supreme Court of Appeals examined the right to implied indemnity in *Hill v. Joseph T. Ryerson & Son*,

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at 182.

<sup>12</sup> The *Harless* court sustained the plaintiff's tort cause of action for emotional distress. See *Monteleone v. Co-Operative Transit Co.*, 128 W.Va. 340, 36 S.E.2d 475 (1945).

<sup>13</sup> See, e.g., *Perk v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979), citing *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975). But see *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (the court construed retaliatory discharge as a contract action).

<sup>14</sup> See *Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1421-27 (1967); Note, *The Employment At Will Rule*, 31 ALA. L. REV. 421, 444-45 (1980); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1454-64 (1975). But see Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment At Will*, 17 AM. BUS. L.J. 467, 472-92 (1979); Note, *A Remedy for Malicious Discharge of the At Will Employee: Monge v. Beebe Rubber Co.*, 7 CONN. L. REV. 758, 763-74 (1975).

<sup>15</sup> Note, 31 ALA. L. REV., *supra* note 14, at 444; Note, 26 HASTINGS L.J., *supra* note 14, at 1454-56.

<sup>16</sup> See 246 S.E.2d at 276. See also Note, 31 ALA. L. REV., *supra* note 14. But see *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (damages for mental distress are recoverable in a contract action).

<sup>17</sup> Note, 31 ALA. L. REV., *supra* note 14, at 445.

*Inc.*<sup>18</sup> Implied indemnity arises from the relationship between the party having to pay damages, the indemnitee, and the party which caused the damages, the indemnitor. While the right to implied indemnity has been acknowledged in West Virginia,<sup>19</sup> it has not been fully discussed.

The plaintiff, Hill, was injured by a defective pipe. Hill sued the supplier, Ryerson, on theories of strict liability in tort and breach of implied warranty of fitness. Ryerson impleaded United States Steel, the manufacturer, as a third-party defendant. The trial court found U.S. Steel ultimately liable. In its appeal, U.S. Steel did not challenge Ryerson's right to claim implied indemnity. Rather, it asserted defenses in an attempt to bar Ryerson's claim. U.S. Steel claimed that Ryerson's recovery is limited by an exculpatory provision in the sales contract, and that the indemnitee failed to give timely notice that damages were claimed from it.<sup>20</sup>

U.S. Steel's first defense was a contractual limitation of liability printed on an order acknowledgment form. This provision limited the buyer's remedy to replacement or refund of purchase price. While exculpatory arrangements are not favored, this one gained credence because both parties had commercial expertise. The court set out several factors for determining unconscionability inferred from past decisions<sup>21</sup> and concluded that the exculpatory provision was not essential to the sales contract between U.S. Steel and Ryerson.<sup>22</sup> It held that the trial court was right in refus-

<sup>18</sup> 268 S.E.2d 296 (W. Va. 1980).

<sup>19</sup> *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 683 n. 22 (W. Va. 1979).

<sup>20</sup> Another issue that U.S. Steel raised had to do with admissibility of hearsay evidence. The evidence in question was the defective pipe bearing the identifying mark which connected it with U.S. Steel. The court held that the pipe was admissible under the business record exception to the hearsay evidence rule. It was this part of the court's opinion from which Justice Caplan dissented. 268 S.E.2d at 301, 311.

<sup>21</sup> Among factors listed by Justice Miller are: relative bargaining strength, whether the limitation provision was bargained for as part of the contract, whether the provision was central to the main purpose of the contract and whether the provision offended public policy. 268 S.E.2d at 307-10. See *Ashland Oil, Inc. v. Donahue*, 223 S.E.2d 433 (W.Va. 1976).

<sup>22</sup> It is possible that U.S. Steel's limitation was not even part of the sales contract. W. VA. CODE § 46-2-207 (1966) speaks of the effect of such additional terms. This is known as the "battle of the forms." See R. NORDSTROM, LAW OF

ing U.S. Steel the benefit of the limitation, thus continuing a tradition of closely construing waivers and limitations of liability and policing against unconscionability.<sup>23</sup>

In considering notice in implied indemnity, the supreme court said that the indemnitor can be bound by the plaintiff without notice if it is impleaded as a third-party defendant.<sup>24</sup> Impleading satisfies the common law notice requirement for implied indemnity.<sup>25</sup>

The appellant also argued that, irrespective of the common law requirements of indemnity, the Uniform Commercial Code<sup>26</sup> demands notice. U.S. Steel's reliance on the U.C.C. was rejected by the court. Justice Miller, writing for the majority, held that the purposes underlying the U.C.C. were inapposite to a products liability action.<sup>27</sup> The defense of lack of notice was unavailable to U.S. Steel.<sup>28</sup>

In *Hill*, the West Virginia supreme court faced one of the most confusing aspects of products liability—how the parallel theories of warranty and strict liability can coexist. In its holding the court favored the tort theory, but did not define to what extent strict liability in tort has eclipsed the U.C.C. warranty the-

SALES, § 37 (1970). Under § 46-2-207(2)(c) Ryerson, by its return form, clearly objected to U.S. Steel's exculpatory provision. Since the parties did not agree on this term, under § 46-2-207(3), it is not part of the contract of sale. 268 S.E.2d at 307.

<sup>23</sup> See *Lodge Distributing Co., Inc. v. Texaco, Inc.*, 245 S.E.2d 157 (W. Va. 1978); *Ashland Oil, Inc. v. Donahue*, 223 S.E.2d 433 (W. Va. 1976); Note, *Contracts—Developing Concepts of Unconscionability*, 80 W. VA. L. REV. 87 (1977).

<sup>24</sup> W.VA. R. Crv. P. 14.

<sup>25</sup> Without notice the indemnity action still exists. However, the elements of the case must be reestablished in separate litigation and the original judgment is not binding on the indemnitor. 268 S.E.2d at 301.

<sup>26</sup> W. VA. CODE § 46-2-607(3)(a) (1966). See generally Annot., 6 A.L.R.3d 1371 (1966).

<sup>27</sup> "We believe that the notice requirement of W. Va. Code, 46-2-607(3)(a), is applicable to the ordinary commercial transaction . . . this Code section should not be extended into the product liability field." 268 S.E.2d at 302-03.

<sup>28</sup> The court, by way of a dictum, elaborated on the relation between a theory of strict liability and a breach of warranty theory. It noted the similarities between the strict liability standard set out in *Morningstar v. Black & Decker Mfg. Co.* and the implied warranty theory delineated in *Dawson v. Canteen Corp.*, 212 S.E.2d 82 (W. Va. 1975). The court then seemed to indicate that the two were interchangeable. 268 S.E.2d at 304.

ory.<sup>29</sup> The primary differences between warranty and strict liability in tort are notice, privity, the statute of limitations and disclaimers. The *Hill* decision rejected the need for notice in a products liability action, even between parties to the sales contract. The court abolished the requirement of privity under a warranty theory in *Dawson v. Canteen Corp.*<sup>30</sup> It has been cogently asserted that the two-year tort statute of limitations controls products liability actions, whether based on tort or warranty.<sup>31</sup> While disclaimers have not been negated, *Hill* demonstrates that they will be strictly construed and voided if unconscionable.<sup>32</sup>

West Virginia has joined the jurisdictions merging strict liability in tort and warranty,<sup>33</sup> a merger advantageous to the tort theory. While the tort action is generally hailed as the simpler,<sup>34</sup> there are implications the court did not face. In the first place, there are benefits found in the notice requirement.<sup>35</sup> More importantly, the court's position defeats expressed legislative intent. The legislature enacted the U.C.C. as positive law, and it is expressly applicable to cases of personal injury.<sup>36</sup>

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<sup>29</sup> See Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code*, 17 WEST. RES. L. REV. 5 (1965), where the author discusses the extent and the implications of this eclipse.

<sup>30</sup> 212 S.E.2d 82 (W. Va. 1975).

<sup>31</sup> *Maynard v. General Elec. Co.*, 486 F.2d 538 (4th Cir. 1973).

<sup>32</sup> It is puzzling that the court, having held that the U.C.C. is unsuited to what is essentially a tort action, did not completely reject disclaimers. See *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); *Rapson, Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692, 711 (1965); Shanker, *supra* note 29, at 29-30. Nonetheless, U.C.C. § 2-302 unconscionability is an effective device for disarming exculpatory provisions.

<sup>33</sup> See *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896; *Jackson v. Muhlenberg Hosp.*, 96 N.J. Super. 314, 232 A.2d 879 (1967), *rev'd on other grounds*, 53 N.J. 138, 249 A.2d 65 (1969).

<sup>34</sup> See *Greenman v. Yuba Power Prod. Co.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); *Santor v. A and M Karagheusian, Inc.*, 44 N.J. 52, 64, 207 A.2d 305, 311 (1965).

<sup>35</sup> Phillips, *Notice of Breach in Sales and Strict Tort Liability Law: Should There Be a Difference?*, 47 IND. L.J. 457, 464-70 (1972); Annot., 6 A.L.R.3d 1371 (1966).

<sup>36</sup> W. VA. CODE § 46-2-715(2)(b) (1966).

## WORKMEN'S COMPENSATION

### I. COURSE OF EMPLOYMENT

In *Calloway v. State Workmen's Compensation Commissioner*,<sup>1</sup> the claimant was employed as an outside salesman for an auto supply company. His duties entailed going on out of town trips to solicit new business. On the occasion in question the claimant had completed his company business by midafternoon, proceeded to visit several of the local taverns, and was involved in an automobile accident later that night. Injuries received in the accident were the basis of a claim for workmen's compensation. The West Virginia Supreme Court of Appeals, deciding this issue for the first time, held that the claimant had made a substantial deviation from the course of his employment and was therefore not entitled to compensation. In so holding, the court adopted the majority view of jurisdictions having workmen's compensation laws similar to West Virginia.<sup>2</sup>

Generally, for an injury to be compensable it must have occurred in the course of the employment,<sup>3</sup> and injuries received while traveling on behalf of an employer's business are within the course of employment and compensable.<sup>4</sup> It is a well settled rule that traveling employees are within the course of their employment from the time they leave home on a business trip until they return, for the self-evident reason that the traveling itself is a large part of the job.<sup>5</sup>

One exception to this general rule is the case where the employee makes a distinct departure from his business purpose and embarks upon a purely personal endeavor. In such a case the

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<sup>1</sup> 268 S.E.2d 132 (W. Va. 1980).

<sup>2</sup> For a general discussion of workmen's compensation law, see 1 LARSON, WORKMEN'S COMPENSATION § 19.00 (1978). West Virginia's workmen's compensation law is found in W. VA. CODE § 23-1-1 et seq. (1978 Replacement Vol.).

<sup>3</sup> W. VA. CODE § 23-4-1 (1978 Replacement Vol.).

<sup>4</sup> *E.g.*, *Cymbor v. Binder Coal Co.*, 285 Pa. 440, 132 A. 363 (1926); *Traynor v. City of Buffalo*, 208 A.D. 216, 203 N.Y.S. 590 (1924).

<sup>5</sup> A well-reasoned decision on this point is *Souza's Case*, 316 Mass. 332, 55 N.E.2d 611 (1944).

deviation from the business purpose takes the employee out of the course of his employment so that any injury received during such deviation will be noncompensable.<sup>6</sup> However, if the deviation is so slight that the business purpose is not interrupted it can be disregarded as being insubstantial.<sup>7</sup>

A split of authority has developed over the question of whether an employee who has completed a personal side trip and is moving back toward his business route when injured should be deemed to have resumed his employment as soon as he starts back or only when he actually regains the main business route. The majority of jurisdictions deny recovery where the injury occurs after the employee has begun to move back toward the business route on the theory that a side trip is a personal deviation until completed.<sup>8</sup> The minority rule is that the course of employment is resumed when the return towards the business route is commenced.<sup>9</sup> Thus, an injury received while returning to the business purpose from the personal deviation will be compensated. The West Virginia court, in *Calloway*, adopted the majority view and held that:

In the case of a major deviation from the business purpose, compensation ordinarily will be barred on the theory that the deviation is so substantial that the employee must be deemed to have abandoned any business purpose and consequently cannot recover for injuries received, even though he has ceased the deviation and is returning to the business route or purpose.<sup>10</sup>

In defining the term "major deviation," the court implied that a case-by-case determination must be made considering factors such as the nature of the employment, the scope of the business trip, any rules or instructions relating to the trip by the em-

<sup>6</sup> 1 LARSON, WORKMEN'S COMPENSATION 19.00 (1979).

<sup>7</sup> *Id.* See *Shapaka v. State Compensation Comm'r*, 146 W. Va. 319, 119 S.E.2d 821 (1961).

<sup>8</sup> *E.g.*, *Public Service Co. v. Industrial Commission*, 395 Ill. 238, 69 N.E.2d 875 (1946); *Kayser v. Carson Pirie Scott & Co.*, 203 Minn. 578, 282 N.W. 801 (1938); *Hess v. Catholic Knights of St. George*, 149 Pa. Super. 575, 27 A.2d 542 (1942).

<sup>9</sup> *London Guarantee & Accident Co. v. Herndon*, 81 Ga. App. 178, 58 S.E.2d 510 (1950).

<sup>10</sup> 268 S.E.2d at 133.

ployer, past practices, length of the deviation, and the degree the deviation varies from the normal business purpose. These are factors that most jurisdictions will consider in determining whether a substantial or major deviation from business purpose has occurred so as to deny compensation.<sup>11</sup>

## II. RIGHT TO COUNSEL

*Fakourey v. Workmen's Compensation Commissioner*<sup>12</sup> held that the Workmen's Compensation Commissioner should advise claimants appearing in their own behalf in hearings before the Workmen's Compensation Appeal Board that they are entitled to and encouraged to retain counsel to represent them. However, the court declined to hold that a claimant has a constitutional right to have appointed counsel.

The right to counsel in administrative proceedings must necessarily find its support in due process concepts since the express provisions for the assistance of counsel in the United States Constitution are contained in the sixth amendment and apply only to criminal prosecutions.<sup>13</sup> Under a due process analysis it has been well established that there is no constitutional right to the assistance of counsel in administrative proceedings which are purely investigatory rather than adjudicatory in nature.<sup>14</sup> However, the Workmen's Compensation Appeal Board, in respect to its authority to hear, adjust, and determine claims for compensation,<sup>15</sup> has powers that are generally regarded as judicial in nature rather than merely investigatory.<sup>16</sup> That being the case, due process would not be met where there was a denial of counsel.<sup>17</sup> It would appear that as a minimum a claimant would be entitled to representation by retained counsel if he so desired. In West Vir-

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<sup>11</sup> *Kinhead v. Management & Engineering Corp.*, 103 S.W.2d 545 (Mo. 1937); *Sawtell v. Stern Brothers & Co.*, 226 Mo. App. 485, 44 S.W.2d 264 (1931); *Murano v. Chrysler Corp.*, 19 A.D.2d 942, 244 N.Y.S.2d 464 (1963).

<sup>12</sup> 258 S.E.2d 526 (W. Va. 1979).

<sup>13</sup> *Brownlow v. Miers*, 28 F.2d 653 (5th Cir. 1928).

<sup>14</sup> *Bowles v. Baer*, 142 F.2d 787 (7th Cir. 1944).

<sup>15</sup> W. VA. CODE § 23-5-3 (1978 Replacement Vol.).

<sup>16</sup> See *Yosemite Lumber Co. v. Industrial Acc. Com.*, 187 Cal. 774, 204 P. 226 (1922); *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 P. 491 (1916); *Cook v. Massey*, 38 Idaho 264, 220 P. 1088 (1923).

<sup>17</sup> See *Hyun v. Landon*, 219 F.2d 404 (9th Cir. 1955).

ginia this conclusion is further supported by the fact that the legislature has statutorily provided for the regulation of attorney's fees.<sup>18</sup> This contemplates that assistance of counsel will be allowed.

Given the fact that a claimant has the right to retain the assistance of counsel if he so wishes, it does not follow that a claimant who cannot afford counsel has the constitutional right to have one appointed for him. Generally, the appointment of counsel for indigents is based upon the due process and equal protection clauses of the constitution. If a person is denied the assistance of counsel merely because he cannot afford one, then he has been denied the equal protection of the laws.<sup>19</sup> The area of greatest application of this concept has been in criminal proceedings.

Under the present system of adjudicating workmen's compensation appeals, a claimant usually enters into a contingency contract for legal representation. Thus, a claimant's ability to retain legal representation is not dependent upon his ability to pay at the time of contracting for the services. Failure to provide such a claimant with appointed counsel would not deprive him of legal representation, and is not necessary to afford equal protection of the laws.

The court did take a somewhat liberal stance by recommending to the commissioner that he advise claimants appearing on their own behalf that they are entitled to and encouraged to retain counsel. Most jurisdictions hold that a claimant need not be informed of his right to counsel and that failure to do so will in no way invalidate the proceeding.<sup>20</sup>

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<sup>18</sup> W. VA. CODE § 23-5-5 (1978 Replacement Vol.).

<sup>19</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>20</sup> *E.g.*, *Berkshire Fine Spinning Associates, Inc. v. Label*, 74 R.I. 6, 60 A.2d 871 (1948).



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